TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1231~~ ~~5218~~ 542 239

THE PACIFIC NATIONAL BANK OF BOSTON, PLAINTIFF IN ERROR,

vs.

MARY J. EATON.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED OCTOBER 17, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 23, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme judicial court before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Mary J. Eaton, of said Boston, plaintiff, and The Pacific National Bank, a corporation existing under the laws of the United States and having its usual place of business in said Boston, defendant, in an action of contract, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Pacific National Bank, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by me, the chief justice being absent from the Commonwealth.

WALBRIDGE A. FIELD,
Senior Associate Justice of the Supreme Judicial Court
of the Commonwealth of Massachusetts.

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court, have hereto set my hand and the seal of said court this twenty-third day of June, A. D. 1887.

[SEAL.] JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, holden at Boston, within and for our county of Suffolk, from the first day of January, in the year of our Lord one thousand eight hundred and eighty-seven, to the first day of January, A. D. 1888, it is thus contained, the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

[SEAL.] To the Sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Pacific National Bank, a corporation existing under the laws of the United States and having its usual place of business in Boston, in said county, to the value of six thousand dollars, and summon the said Pacific National Bank (if it may be found in your precinct) to appear before our justices of our superior court next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto Mary J. Eaton, of Boston, in an action of contract, to the damage of the said Mary J. Eaton (as she says) the sum of six thou-
5 sand dollars, which shall then and there be made to appear with other due damages; and have you there this writ with your doings therein.

Witness Lincoln Flagg Brigham, Esquire, at Boston, the fourteenth day of March, in the year of our Lord one thousand eight hundred and eighty-two.

JOSEPH A. WILLARD, *Clerk.*

Upon which writ is the following return by the officer who served the same, viz:

SUFFOLK, *ss:*

BOSTON, *March* 17, 1882.

I this day attached a chip as the property of the within-named Pacific National Bank, and gave a summons with an attested copy of this writ to E. C. Whitney, its cashier, for its appearance to answer at court.

HARUM MERRILL,
Dep'ty Sheriff.

Fees:

Service & tr.	58
Copy	1 00
	$1 58

6 And upon the day on which said writ was returnable the plaintiffs, upon entering the same, filed *their* declaration as follows, to wit:

7 *Declaration.*

SUFFOLK, *ss:*

Superior Court. April Term, 1882.

MARY J. EATON *vs.* THE PACIFIC NATIONAL BANK.

And the plaintiff says that the defendant owes her four thousand dollars and interest thereon from the twenty-eighth day of September, 1881, for money had and received by it to her use at that time.

And, in a second count for the same cause of action, the plaintiff says that on the twenty-eighth day of September, 1881, she paid to the defendant four thousand dollars, which it then agreed to apply in payment for forty shares, of the par value of one hundred dollars each, of capital stock in the Pacific National Bank in an increase of said capital stock in the amount of five hundred thousand dollars, which increase of five hundred thousand dollars it then
8 agreed to make and to issue to her within a reasonable time after the said twenty-eighth day of September forty shares of said increase of capital of the par value of one hundred dollars each; and the plaintiff says that the defendant did not so apply said four thousand dollars for the use and benefit of the plaintiff, as it was bound to do, and it did not within a reasonable time thereafter issue and give to her nor has it at any time issued or given to her forty shares of said stock of the par value of one hundred dollars each in an increase of five hundred thousand dollars of said capital stock, as it agreed to do, but has wholly failed so to do, and it owes her said four thousand dollars, with interest thereon since the same was paid to it as aforesaid.

By her attorney, J. H. BENTON, JR.

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court, have hereto set my hand and the seal of said court this twenty-third day of June, A. D. 1887.

[SEAL.] JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, holden at Boston, within and for our county of Suffolk, from the first day of January, in the year of our Lord one thousand eight hundred and eighty-seven, to the first day of January, A. D. 1888, it is thus contained, the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

[SEAL.] To the Sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Pacific National Bank, a corporation existing under the laws of the United States and having its usual place of business in Boston, in said county, to the value of six thousand dollars, and summon the said Pacific National Bank (if it may be found in your precinct) to appear before our justices of our superior court next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto Mary J. Eaton, of Boston, in an action of contract, to the damage of the said Mary J. Eaton (as she says) the sum of six thou-
5 sand dollars, which shall then and there be made to appear with other due damages; and have you there this writ with your doings therein.

Witness Lincoln Flagg Brigham, Esquire, at Boston, the fourteenth day of March, in the year of our Lord one thousand eight hundred and eighty-two.

JOSEPH A. WILLARD, *Clerk.*

Upon which writ is the following return by the officer who served the same, viz:

SUFFOLK, *ss:*

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HARUM MERRILL,
Dep'ty Sheriff.

Fees:

Service & tr.	58
Copy	1 00
	$1 58

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7 *Declaration.*

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Superior Court. April Term, 1882.

MARY J. EATON *vs.* THE PACIFIC NATIONAL BANK.

And the plaintiff says that the defendant owes her four thousand dollars and interest thereon from the twenty-eighth day of September, 1881, for money had and received by it to her use at that time.

And, in a second count for the same cause of action, the plaintiff says that on the twenty-eighth day of September, 1881, she paid to the defendant four thousand dollars, which it then agreed to apply in payment for forty shares, of the par value of one hundred dollars each, of capital stock in the Pacific National Bank in an increase of said capital stock in the amount of five hundred thousand dollars, which increase of five hundred thousand dollars it then
8 agreed to make and to issue to her within a reasonable time after the said twenty-eighth day of September forty shares of said increase of capital of the par value of one hundred dollars each; and the plaintiff says that the defendant did not so apply said four thousand dollars for the use and benefit of the plaintiff, as it was bound to do, and it did not within a reasonable time thereafter issue and give to her nor has it at any time issued or given to her forty shares of said stock of the par value of one hundred dollars each in an increase of five hundred thousand dollars of said capital stock, as it agreed to do, but has wholly failed so to do, and it owes her said four thousand dollars, with interest thereon since the same was paid to it as aforesaid.

By her attorney, J. H. BENTON, JR.

9 This action was commenced in the superior court, begun and holden at Boston, within and for said county of Suffolk, on the first Tuesday of April, A. D. eighteen hundred and eighty-two, when and where the parties appeared, and the defendant corporation, by Morse and Stone, Esquires, its attorneys, filed its answer as follows, to wit:

10 *Defendant's Answer.*

SUFFOLK, *ss:*

Superior Court. April Term, 1882.

MARY J. EATON *vs.* THE PACIFIC NATIONAL BANK OF BOSTON.

Now comes the defendant and, for answer to the first count of the plaintiff's declaration, denies each and every allegation therein contained.

And, for answer to the second count of the plaintiff's declaration, the defendant denies each and every allegation therein contained.

And, for further answer to said second count, it says that it is and ever since the year 1877 has been a national banking association duly organized and established under the laws of the United States; that on September 13, 1881, the directors of the defendant association, being thereto duly authorized, voted to increase the capital stock of said association from five hundred thousand to one

11 million dollars; that thereupon the plaintiff, being the holder of forty shares of the capital stock of said association, became entitled to take forty shares of the new stock upon paying four thousand dollars therefor to the association on or before October 1 then next ensuing; that on or about September 28, 1881, the plaintiff paid the defendant four thousand dollars for said forty shares of new stock, and subsequently, before this action was begun, the same were placed in her name and a certficate was issued to her therefor.

By its attorneys, MORSE & STONE.

Filed May 4, 1882.

12 And on the fourth day of May, A. D. 1882, Edmund C. Whitney, in behalf of the defendant corporation, filed his affidavit in the words following, viz:

SUFFOLK, *ss:*

Superior Court. April Term, 1882.

MARY J. EATON *vs.* THE PACIFIC NATIONAL BANK OF BOSTON.

I, Edmund C. Whitney, cashier, in behalf of the defendant hereby make oath that I verily believe that the defendant in said action has a substantial defence thereto; that the amount in controversy exceeds four thousand dollars; that the defendant intends to bring the cause to trial, and in its behalf I request that the same may be removed to the supreme judicial court.

EDMUND C. WHITNEY, *Cashier.*

SUFFOLK, *ss:*

Subscribed and sworn to before me May 4, 1882.

RICHARD STONE, JR,
Justice of the Peace.

13 Thereupon it was ordered by said superior court to be removed accordingly, and the same was entered in our said supreme judicial court during the April term thereof, A. D. eighteen hundred eighty-two, when and where the parties appeared.

Thence the action was continued from term to term unto the September term, A. D. eighteen hundred eighty-four, when and where the plaintiff appeared, and Ranney and Clark, Esquires, appeared as attorneys for said defendant corporation, vice Morse and Stone, Esquires.

And the action was thence continued from term to term and from sitting to sitting unto the fifth day of May, A. D. eighteen hundred eighty-six, when and where the parties appeared, and after a full hearing the case was reserved upon the report of the presiding justice for the consideration of the full court.

And on the thirteenth day of November, A. D. eighteen hundred eighty-six, Ranney and Clark, Esquires, as attorneys for Peter Butler, receiver, filed the following motion, viz:

14 *Motion by Peter Butler.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

Peter Butler, of Boston, in the State of Massachusetts, represents that he has been duly appointed and qualified as receiver of the Pacific National Bank in place of Linus M. Price, removed. He therefore asks to be admitted as a party to defend said action.

By his attorneys, RANNEY & CLARK.

15 Thence the action was continued, and on the twenty-third day of March, A. D. eighteen hundred eighty-seven, it was ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, March 23, 1887.

In the case of Mary J. Eaton *vs.* Pacific National Bank, pending in the supreme judicial court for the county of Suffolk, ordered, That

the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment to be entered for the plaintiff for four thousand dollars and interest from January 10th, 1882.

By the court:

GEO. W. NICHOLS, *Clerk.*

March 23, 1887.

16 Whereupon, on the 30th day of said March, the said receiver, by his attorneys, filed his motion for a rendering of special judgment as follows, to wit:

17 *Motion of Defendant.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON

vs.

THE PACIFIC NATIONAL BANK; PETER BUTLER, Rec'r, Admitted to Defend.

The said Butler, as receiver and in the name of the said bank, comes and moves that a special judgment only be rendered in said action to the effect that the amount found to be due is a just claim to be allowed in proof before the receiver as a debt due from the bank, with interest only up to May 22nd, 1882, and that no execution on the judgment be allowed to issue against the bank for damages or costs of suit, and that an order to that effect be issued.

By his attorney, A. A. RANNEY.

18 And also, on said thirtieth day of March, said receiver filed a further motion as to the record in said case, viz:

19 *Motion of Defendant.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON

vs.

THE PACIFIC NATIONAL BANK, Peter Butler, Rec'r.

Peter Butler, receiver, defending said case in the name of the said bank, comes and says that he is directed and authorized by the Comptroller of the Currency to take out a writ of error in said case as soon as a judgment is entered and carry the same to the U. S. Supreme Court under the provisions of section 709 of the United States R. S. and other laws of the U. S. He therefore asks the court

to order the opinion of the court as delivered to be made a part of the record, and also that a certificate may be made that Federal questions were raised by the defendant and decided adversely to the defendant within the provisions of the laws of the United States so as to entitle the defendant to a writ of error.

By A. A. RANNEY, *Attorney.*

20 And on the eighth day of April, A. D. eighteen hundred eighty-seven, the following agreement was filed by the parties, viz:

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *vs.* PACIFIC NATIONAL BANK.

It is agreed that Peter Butler, as receiver of defendant bank, appeared in said case on May 5, 1886, when said case was heard and reserved by the court, and that it may be entered on the record of the case that he appeared to defend said case in the name of the bank and was admitted for that purpose.

J. H. BENTON, Jr., *For Pl'ff.*
RANNEY & CLARK,
Att'ys for Peter Butler, Rec'r.

21 Whereupon, on the eighteenth day of said April, said receiver filed a motion for a rehearing and new trial, as follows, to wit:

22 *Application for a Rehearing and a New Trial by Defendant.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON

v.

PACIFIC NATIONAL BANK, Peter Butler, Rec'r, Defending.

Peter Butler, the receiver defending said case, now comes and says that the said case was not heard and tried before the court upon evidence, but counsel undertook to agree upon the facts and prepared the statement contained in the report purporting to be the facts as if found by the court upon a hearing. In truth and in fact, the statement was proposed by the plaintiff's counsel and assented to by defendant's counsel, and the report was put in that form by them and adopted by the court by their consent. The senior counsel was absent at Washington, engaged in the discharge of his public duties, when the case came up and was forced to trial, and the junior counsel agreed to the statement of facts and the report as aforesaid, upon the best of information which he could obtain at the time,
23 but it is now ascertained and can be proved beyond doubt, and there can be no just contention on the point, that a ma-

terial and perhaps vital portion of the statement of facts found aforesaid is contrary to the truth. The junior counsel, in agreeing to the same, mistook the facts, was ignorant of them himself, and he was misled, misinformed, and deceived by those who, as he supposed, knew them, and of whom he enquired and upon whom he relied for information. Since the opinion of the court was rendered the facts have been ascertained and the deception practiced upon the junior counsel of the defendant made apparent, and it can now be proved and the true basis of fact established.

The plaintiff therefore asks for a rehearing and a new trial, to the end that the decision, if judgment is to be rendered, may rest upon the true basis of facts and the case properly presented to the United States Supreme Court. He will file directly a statement of the facts as they are and can be proved, verified by affidavits and documentary evidence.

PETER BUTLER, *Rec'r*,
By RANNEY & CLARK, *Att'ys.*

24 And on the tenth day of May, A. D. eighteen hundred eighty-seven, after a full hearing, said motions as to rendering of special judgment, as to record, and for a rehearing and new trial were severally overruled.

Thereupon the motion of defendant that said receiver be admitted to appear in said cause and defend the same as of May 5, 1886, was allowed.

Whereupon, on said tenth day of May, the plaintiff filed his motion for judgment upon the rescript as follows, to wit:

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *vs.* PACIFIC NATIONAL BANK.

APR. 12, '87.

The plaintiff moves for judgment on the rescript.

J. H. BENTON, JR.,
For Pl'ff.

25 Which motion was allowed, and thereupon it was ordered that judgment be entered in the sum of $4,000 as damages, with interest from January 10, 1882, to May 22, 1882, with costs.

It was therefore considered by the court, on the tenth day of May, A. D. eighteen hundred eighty-seven, that the said Mary Jane Eaton recover against the said Pacific National Bank the sum of four thousand and eighty-eight dollars damages and costs of suit, taxed at $77.49.

And a stay of execution was thereupon ordered.

25 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Marcus Morton, Esquire, chief justice of our said supreme judicial court, at Boston, this twenty-third day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] JOHN NOBLE, *Clerk.*

27 The following is the assignment of errors:

28 SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *vs.* PACIFIC NAT. BANK, Peter Butler, Rec'r.

In matter of the writ of error granted in said case.

The defendant, Peter Butler, assigns as errors in said case the following, to wit:

1. The court has erred in holding that the plaintiff is entitled to recover on the facts found and appearing of record under the statutes and laws of the United States.

2. The court erred in holding that there was an implied condition that the capital stock should be increased and effected to the sum of $500,000, else she was not to be bound and was to have her money back, the defendant claiming that, under the statutes and laws of the United States and the articles of association which are to govern, this was not so.

29 3. The court erred in not holding that the increased capital was valid and that it could not be invalidated by the plaintiff on the facts appearing in detail under the statutes and laws of the United States.

4. The court erred in applying to the case the law of the State of Massachusetts and other States and not the statutes and laws of the United States.

5. The court erred in not giving full force and effect to the statutes of the United States and the articles of association.

By RANNEY & CLARK.

Copy.
Attest: JOHN NOBLE, *Clerk.*

30 The following is the application for the writ of error:

31 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

MAY 11, 1887.

To the honorable the chief justice of the supreme judicial court:

Respectfully represents George M. Stearns, United States attorney for the district of Massachusetts, that at the request of the Secretary of the Treasury he has been directed by the Attorney General of the United States, by letter hereto annexed, to apply for a writ of error

from this court to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank, which has recently been decided in this court in favor of the plaintiff in order that Peter Butler, Esq., receiver of said bank, may, under the provisions of section 1001 of the Revised Statutes of the United States, be relieved from the obligation of giving a bond of security on such appeal.

32 Wherefore he petitions that such writ of error be allowed as aforesaid, and will ever pray.

GEO. M. STEARNS,
U. S. Attorney,
By J. R. REED,
Ass't U. S. Att'y.

33 N. T. N. R. M. B. M.

In any further correspondence on this subject quote the above initials.

File No. 3291, '87.

DEPARTMENT OF JUSTICE,
WASHINGTON, *May* 4, 1887.

G. M. Stearns, Esq., United States attorney, Boston, Mass.

SIR: I transmit herewith a copy of a letter of the 2d instant, with its enclosure, from the Secretary of the Treasury, requesting that an appeal be taken by the Government to the United States supreme court of Massachusetts in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston.

You are instructed to carry out the wishes of the Secretary, first sending the transcript of appeal to the Department for examination.

Respectfully,

A. H. GARLAND,
Attorney General.

34 Copy. M. B. M., J. W.

TREASURY DEPARTMENT, *May* 2, 1887.

The honorable the Attorney General.

SIR: I have the honor to enclose herewith copy of a letter, dated 28th ultimo, from the Comptroller of the Currency, requesting that, in order that the receiver of the Pacific National Bank of Boston may not be subjected to inconvenience in giving bond in an application for a writ of error to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston, decided in the supreme judicial court of Massachusetts in favor of the plaintiff, an appeal may be directed by this Department in the above-entitled cause, and to request that you cause the necessary action in the matter to be taken.

Respectfully yours,

C. S. FAIRCHILD, *Secretary.*

35 TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *April* 28, 1887.

Hon. Hugh S. Thompson, acting Secretary of the Treasury.

SIR: Upon the recommendation of Mr. Peter Butler, receiver of the Pacific National Bank of Boston, Mass., approved by me, it is desired to apply for and take a writ of error to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston, Mass., which has been decided in the supreme judicial court of the State of Massachusetts in favor of the plaintiff.

Section 1001 of the Revised Statutes of the United States provides that when an appeal is brought up to the Supreme Court by direction of any Department of the Government no bond, obligation, or security shall be required from any party acting under the direction aforesaid. Such an appeal has the effect of a supersedeas,
36 and the receiver would be relieved from the obligation of giving a bond.

In order that Mr. Butler may not be subjected to inconvenience in giving a bond, I respectfully request you to direct an appeal to be made in the above-entitled cause.

Very respectfully, W. L. TRENHOLM,
Comptroller.

Copy.
Attest: JOHN NOBLE, *Clerk.*

37 [Endorsed:] Eaton *vs.* Pacific National Bank. Certified copy of the opinion of the supreme judicial court.

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June* 14, 1887.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Mary J. Eaton *vs.* Pacific National Bank, decided on the twenty-third day of March, 1887.

JOHN LATHROP,
Reporter of Decisions.

38 The following is the opinion of the supreme judicial court for the Commonwealth:

39 FIELD, *J.*:

When this action was brought the bank was not in the hands of a receiver, and the receiver afterwards appointed has not formally intervened or appeared, but it was understood at the argument that the action was defended by him, and that he desired that it
40 should be prosecuted for the purpose of determining the liability of the bank. See Bethel Bank *v.* Pahquioque Bank, 14 Wall., 383.

The case was reserved for the consideration of the full court, presumably under the Pub. Sts., c. 150, § 8. The facts have been found, and, although the questions of law have not been stated in the report, it is plainly the intention of the report to reserve the question of law whether, on the facts found or such of them as are competent, judgment should be entered for the plaintiff or for the defendant. We are of opinion that the reservation is within the power conferred by this section of the statutes, and we consider the case as if it were reserved for judgment upon the facts found, which are in the nature of a special verdict. See Terry *v.* Brightman, 129 Mass., 535.

By the articles of association of the bank "the capital may be increased, according to the provisions of § 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars," and the board of directors shall have power "to provide for an increase of the capital of the association and to regulate the manner in which such increase shall be made." The vote of the directors of September 13, 1881, to increase the capital stock to $1,000,000, which was an increase of $500,000, and the subsequent vote of December 13, 1881, to increase the capital stock by $461,300, instead of $500,000, were therefore both within the power of the board.

The case raises a question which was suggested, but not decided in Delano *v.* Butler, 118 U. S., 634. It was there said: "It will be observed that, without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did, in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors, and such payment and acceptance of the certificates in accordance therewith might amount, under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in,
41 but without insisting upon that point or deciding it we think that the subsequent conduct of the plaintiff in error amounts to a ratification." 118 U. S., 650.

In the present case the plaintiff paid in her money, but did not accept a certificate of stock.

To make the increase of the capital stock valid it must be authorized in accordance with the articles of the association. The whole amount of it must be paid in. Notice thereof must be trasmitted to the Comptroller, and he must certify "that it has been duly paid in as part of the capital of such association," and must approve of it. U. S. Rev. Sts., § 5142. The plaintiff, therefore, was compelled to pay in her money before the final action of the Comptroller in order to become entitled to any part of the new stock. Within the maximum of the increase of capital stock provided for by the articles of association the Comptroller could not determine the amount of the increase except by approving or refusing to approve the amount

authorized by and paid into the bank. The united action of the bank or its directors, of the subscribers to the new stock, and of the Comptroller was required to effect an increase of the capital stock; and when the plaintiff paid in her money she ran the risk that the contemplated increase of $500,000 might fail either because it might not all be subscribed for and paid or because the Comptroller might refuse his approval; but she did not run the risk that if it were all paid in the Comptroller might, without any further action of the bank or its directors, reduce the amount of the increase, because he had not the lawful power to do this. If the Comptroller refused his approval the plan failed. The directors by a new vote might authorize another and a different increase of the capital stock, which, if the amount was paid in and the Comptroller approved of it, would become an actual increase of capital stock; but this would be an abandonment of the first plan by the bank and the adoption of another.

Upon the ordinary principles of contract, if the plaintiff paid in her money for forty shares of stock on the condition that five thousand shares of stock should be created, she could not be bound to take the forty shares if the condition was not performed. If there was such a condition the plaintiff could not be required to
42 take forty shares out of four thousand six hundred and thirteen shares, which the bank by a subsequent vote authorized, unless there is something in the facts which shows that the amount of stock to be created was immaterial, or unless she assented to the change or her assent is to be implied, or unless, on grounds of public policy and the rights of creditors, she cannot be permitted to withdraw her money after the Comptroller has certified that a certain amount has been paid in as an increase of the capital stock, which amount includes the sum she has paid.

Whether the plaintiff shall become the owner of forty out of five thousand shares of capital stock or the owner of forty out of four thousand one hundred and sixty-three shares cannot be regarded as immaterial, particularly in a corporation where the stockholders are liable to an assessment to the amount of the stock held by each to supply a deficiency in the capital stock (U. S. Rev. Sts., § 5205), and are also held "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." U. S. Rev. Sts., § 5151.

Neither can we perceive any sound reason why, in legal contemplation, she must be held to have assented to the change whereby the amount of the contemplated increase was reduced to $461,300. She paid in her money under a vote whereby the capital stock was to be increased by $500,000. If this amount was not paid in or the Comptroller did not approve of this increase there was an end of the proposition which had been voted and which she and the bank had in contemplation when she paid in her money. If the directors of the bank, after she paid in her money, abandoned their original vote and passed another vote for an increase different in amount

it is difficult to see how she was bound by it. They were not her agents; the new vote was not passed in furtherance of the original proposition to make the increase $500,000; the vote was not a reduction of the capital stock of the bank, because the increase had not then been made, and the capital stock of a banking association can only be reduced by a vote of the shareholders. U. S. Rev.
43 Sts., § 5143. To make the increase of the capital stock $461,300 instead of $500,000 was essentially a new proposition, authorized for the first time on December 13, 1881, nearly two months and a half after the plaintiff paid in her money.

On the facts found the intention of the directors and of the Comptroller is apparent. The bank failed on November 18, 1881, and, before this, $461,300 had been paid into the bank for new stock, to be created under the vote passed on September 13, 1881. It was not likely that any more money would be paid in for this purpose after the failure of the bank. The bank had received this money, and had used and lost it. On its failure a bank examiner took possession of the bank and its assets and remained in possession until March 18, 1882. While its assets were in the possession of the bank examiner it was decided to make this $461,300 a part of the capital stock of the bank; it would then cease to be a debt of the bank, and the creditors of this sum, having thus been made stockholders, would then be liable to an assessment to an equal amount to supply the deficiency of capital stock, and would also be liable to pay another equal amount to satisfy the debts of the bank. The directors accordingly passed the vote of December 13, 1881, which in form is a reduction of the capital stock by the sum of $38,700, but in fact is a vote authorizing the increase of the capital stock by $461,300; and they attempted to apply the money paid in under the previous vote to this new increase which they had voted, and then voted that the Comptroller of the Currency be notified that the capital had been increased by this sum and that the whole amount had been paid in, and they requested the Comptroller to issue his certificate. The cashier on the same day sent to the Comptroller a copy of the foregoing votes and his certificate that the capital had been increased by the sum of $461,300, all of which had been paid in. The copy of the votes sent to the Comptroller informed him that the attempt to obtain $500,000 for an increase of the capital stock had failed, and because it had failed that the directors had fixed the amount of the increase at $461,300 and had declared the money paid in under the previous vote as paid in for the new stock voted on December 13. The Comptroller of the Currency, on December 16, 1881, issued the usual certificate approving of "said increase of capital stock"
44 to the amount of $461,300, and on the same day sent to the bank a notice that its entire capital stock, including the increase he had just then approved, having been lost an assessment of one hundred per cent must be laid upon the shareholders; otherwise the bank must go into liquidation or a receiver must be appointed, according to U. S. Rev. Sts., § 5234.

It is argued that the certificate of the Comptroller is conclusive on the plaintiff that the sum of $461,300 was actually paid in as an in-

crease of capital stock, and that this includes the amount which she paid. Undoubtedly the public, in dealing with a bank, do rely to some extent upon the certificate by the Comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in; and so long as the certificate remains unrevoked it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false it is probable that an assessment may be laid upon the shareholders to make up the deficiency in the capital stock; but that the certificate of the Comptroller makes any one a shareholder who is not one, or enables a bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which we cannot assent. The obligation of the plaintiff to take the new shares depends upon her contract with the bank. If we assume that immediately after the vote of December 13, 1881, the plaintiff could have treated the original vote as abandoned and could have demanded her money and brought and maintained an action to recover it the action of the directors and of the Comptroller in erroneously including the amount she had paid in the amount which had been paid in to increase the capital stock by $461,300 cannot affect her legal relations with the bank, unless she had assented to or ratified that action, or is estopped by her conduct or has been guilty of laches. As she demanded repayment, on January 10, 1882, of the money she had paid, she is not guilty of laches. It is not contended that there is any estoppel, and it is plain that there is no evidence of actual assent or ratification.

The defendant denies that it was the contract between it and the plaintiff that she should receive forty shares out of five thousand shares of new stock, and says that the contract was that she should receive forty shares of new stock, and that there was no condition attached to the contract that the capital stock should be increased by $500,000. This objection is fundamental. The plaintiff did not subscribe for stock, but paid in her money in pursuance of the vote of September 13, 1881, and she took a receipt. There is no express condition, but, construing the receipt in connection with the vote, it is plain that she paid in her money for forty shares of the new stock voted on September 13.

In Warwick Railroad *v.* Cady, 11 R. I., 131, 137, it is said: "If the charter had provided for a definite capital or if, by general law, provision had been made that the enterprise should not be commenced until some definite proportion or amount should be subscribed, * * * or if before subscription the capital had been fixed by vote or agreement, then it might well be held that the raising the whole amount was a condition of the subscription; and so, also, if the amount was named in the paper subscribed." This statement of the law is supported by our own decisions and by many others. Salem Mill-Dam Corporation *v.* Ropes, 6 Pick., 23, and 9 Pick., 187; Central Turnpike *v.* Valentine, 10 Pick., 142; Cabot & West Springfield Bridge *v.* Chapin, 6 Cush., 50; Atlantic Cotton Mills *v.* Abbott, 9 Cush., 423; People's Ferry Co. *v.* Balch, 8 Gray, 303; Troy & Greenfield Railroad *v.* Newton, 8 Gray, 596; Katama Land Co. *v.*

Jernegan, 126 Mass., 155; Read *v.* Memphis Gas Co., 9 Heisk., 545; Santa Cruz Railroad *v.* Schwartz, 53 Cal., 106; Hughes *v.* Antietam Manuf. Co., 34 Md., 316; Ridgefield & New York Railroad *v.* Brush, 43 Conn., 86; Ticonic Water-Power Co. *v.* Lang, 63 Maine, 480; Lewey's Island Railroad *v.* Bolton, 48 Maine, 451; Allman *v.* Havana, Rantoul & Eastern Railroad, 88 Ill., 521; Memphis Branch Railroad *v.* Sullivan, 57 Ga., 240; Peoria & Rock Island Railroad *v.* Preston, 35 Iowa, 115; Contoocook Valley Railroad *v.* Barker, 32 N. H., 363; Norwich & Lowestoft Nav. Co. *v.* Theobald, M. & M., 151; Pitchford *v.* Davis, 5 M. & W., 2; Peirce *v.* Jersey Waterworks Co., L. R., 5 Ex., 209.

If, however, the amount of the capital stock is left indefinite or the maximum and minimum of the amount only are defined, with the right in the corporators or directors subsequently to determine the amount, a subscription to stock must be deemed absolute unless there is an express condition inserted in the subscription, or unless a sufficient amount is not subscribed to enable the corporation legally to organize. Penobscot & Kennebec Railroad *v.* Bartlett, 12 Gray, 244; Boston, Barre & Gardner Railroad *v.* Wellington, 113 Mass., 79; Boston & Albany Railroad *v.* Pearson, 128 Mass., 445.

46

A subscription to an increase of capital stock manifestly differs from a subscription to the original stock in this, that the subscriber is dealing with a corporation already organized and doing business, and it has been said that there is no implied condition that the whole number of the new shares created should be subscribed for or issued; but whether there is an implied condition attached to a subscription for new stock depends upon the contract of subscription, construed with reference to the law and the facts under which it is made, and this is to be determined in the same manner and upon the same principles in subscriptions for new stock as in subscriptions for original stock. See Charleston *v.* People's National Bank, 5 S. Car., 103. In the common case of a corporation authorized to create new stock by a vote of its stockholders or directors the stock is created by the vote. In the absence of any statute prescribing how it shall be disposed of, it may be allotted among the stockholders or it may be sold from time to time as the corporation needs money. It may be sold by subscription and the stockholders may be entitled to a preference in subscribing, and they may sell their rights. If the law requires that the new stock be paid for at par before it is issued this must, of course, be done, but unless a statute or a by-law requires that the new stock shall all be subscribed for before it is created or issued there is no implied condition that all the stock created shall be subscribed for or issued. The increase of the capital stock is fixed by the vote, and the corporation is left to dispose of the new stock as it can according to law. Nutter *v.* Lexington & West Cambridge Railroad, 6 Gray, 85.

But in the case at bar the provisions of the statutes of the United States relating to an increase of the capital stock are even more strict than those relating to the original stock. An association may be

authorized to commence business when fifty per cent. of the
47 capital stock has been paid in (U. S. Rev. Stats., § 5140), but there can be no increase in the capital stock until the whole amount of the increase has been paid in (§ 5142). The vote of the directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done and that the Comptroller should certify that they had been done and approve of the increase. We think that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless $500,000 was paid in and the Comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created.

The result is that the plaintiff is entitled to judgment for $4,000, with interest from January 10, 1882, the date of her demand.

So ordered.

Copy.
Attest: JOHN NOBLE, *Clerk.*

48 The following is the report to the full court of the justice before whom the case was heard:

49 *Report.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court. April Sitting, 1886.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

The defendant is a national banking association organized under the laws of the United States by articles of association, a copy of which is hereto annexed, marked "Exhibit A," and by the adoption of by-laws, section eleven of which is as follows:

"Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to sub-
50 scribe for in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

On the 13th of September, 1881, the capital stock of the defendant was five hundred thousand dollars, of which the plaintiff owned

forty shares, which stood in her name on the books of the defendant, and for which she held a certificate, a copy of which is hereto annexed, marked "Exhibit B." On that day the directors of the defendant voted "that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par to an equal amount to that now held by them," and the following notice of such increase was sent to and received by the plaintiff:

51 A. I. Benyon, president; J. M. Pettengill, cashier.

Pacific National Bank.

105 DEVONSHIRE STREET, BOSTON, *Sept.* 13, 1881.

"At a meeting of the directors of this bank held this day it was—

"Voted, That the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

"J. M. PETTENGILL, *Cashier.*"

No subscription books were opened and the plaintiff did not subscribe for any stock in said increase of capital, but on the 28th of September, 1881, she paid to the defendant four thousand dollars and received therefor the following receipt:

52 "Pacific National Bank.

"$4,000. Sep. 28.

"BOSTON, *October 1st*, 1881.

"Received of Mary J. Eaton four thousand dollars on account of subscription to new stock.

"J. M. PETTENGILL, *Cashier.*"

The whole amount of increase of capital to one million dollars, being five hundred thousand dollars, was never paid in, and no notice was ever transmitted to the Comptroller of the Currency that said additional five hundred thousand dollars had been paid in or that the whole amount of such proposed increase of the capital to one million dollars had been paid in, and the Comptroller never issued a certificate stating that the said capital stock had been increased to the amount of one million dollars, voted as above set forth, nor did he ever certify his approval of such increase or that it had been duly paid in as a part of the capital of said defendant,
53 and no action was taken by him respecting any increase of stock from that of five hundred thousand dollars, except as hereinafter stated. Only four hundred and sixty-one thousand three hundred dollars of said proposed increase of five hundred thousand dollars was ever taken or paid in, all of which was paid in prior to November 18, 1881, and was used in the general business of the bank with its other funds. November 18, 1881, the de-

fendant became unable to meet its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business.

Daniel Needham, a duly appointed examiner of national banks, having made an examination of said bank, and having reported its condition to the Comptroller of the Currency, was, on said eighteenth day of November, 1881, placed in charge and possession of said bank and all its funds, assets, records, and books by said Comptroller. Said bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882, the directors thereof having in the meantime no possession or control over the assets of said bank
54 or the moneys received or paid out on account of the bank, except under the supervision, control, and authority of said examiner.

December 13, 1881, the directors of the defendant passed the following vote:

"Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

"And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock should be payable October 1st;

"And whereas $461,300 of said new stock has been taken and paid in;

"And whereas $38,700 thereof has not been taken and paid in;

"Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

55 "Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase, according to law."

On the same day the cashier of the defendant, by direction of the directors and upon suggestion of the Comptroller that such a certificate should be sent to him, sent the following certificate, duly sworn to by the cashier to the Comptroller of the Currency, together with a copy of the foregoing vote:

"Pacific National Bank of Boston.

"DECEMBER 13, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of the Pacific National Bank of Boston has been increased, pursuant to the articles
56 of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has

been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

"[SEAL.] J. M. PETTENGILL, *Cashier.*"

On receipt of said certificate and copy the Comptroller of the Currency sent to the directors of the defendant the following certificate:

"TREASURY DEPARTMENT,
"OFFICE OF THE COMPTROLLER OF THE CURRENCY,
"WASHINGTON, *Dec.* 16, 1881:

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased to the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with its articles of association, and that the whole amount of such increase has been paid in: Now, it is hereby
57 certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid, has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid in to said bank as a part of the capital thereof, and that the said increase of capital stock is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

"[SEAL.] JOHN J. KNOX,
"*Comptroller.*"

There was no vote of the stockholders of the defendant relating to the increase or reduction of its capital stock.

On the 16th of December the Comptroller sent to the defendant the following communication:

"WASHINGTON, *Dec.* 16, 1881.

"To the Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of The Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one
58 thousand three hundred dollars ($961,300), having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred per cent. upon its stockholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

"[SEAL.] JOHN JAY KNOX,
"*Comptroller of the Currency.*"

59 No certificate of stock in said proposed increase of capital in the amount of five hundred thousand dollars was made by the bank, nor was any certificate in said claimed increase of four hundred and sixty-one thousand three hundred dollars received by or offered to the plaintiff, but when the certificate from the Comptroller, made December 16, was received by the bank a certificate of forty shares in said claimed increase of four hundred and sixty-one thousand three hundred dollars was made by the bank, a copy of which is hereto annexed, marked C, which was never called for, taken by, or tendered to the plaintiff, but still remains in the certificate book, and she was then registered in the stock register of the bank as the owner thereof without her knowledge. No certificates in said claimed increase was ever tendered by the bank to any persons to whom they were made, but were delivered to them when called for. No communication was made to the plaintiff with reference to said vote of the directors of December 13, or change in said proposed increase, or said certificate of said Comptroller, or said certificate made to her, and she never assented to any change
60 in the proposed increase in the sum of $500,000.

On the tenth of January, 1882, before the opening of the annual meeting, hereinafter referred to, she made the following demand upon the defendant in writing, delivered to its directors:

"BOSTON, *January* 10, 1882.

"To the Pacific National Bank:

"The conditions upon which you received four thousand dollars of me on the twenty-eighth day of September, 1881, not having been performed, I hereby demand repayment of said four thousand dollars.

"MARY J. EATON,
"By J. H. BENTON, JR., *Att'y.*"

On December 10, 1881, the directors voted to call the annual meeting of the stockholders to be held on January 10, 1882, and thereupon the following notice was sent to and received by plaintiff, viz:

61 "Pacific National Bank.

"The annual meeting of the stockholders of this bank, for the choice of directors and for any other business that may legally come before them, will be held at their banking-rooms, 105 Devonshire street, on Tuesday, January 10, 1882, at 11 o'clock a. m.

"J. M. PETTENGILL, *Cashier.*"

This notice was also printed in the newspapers then published in Boston. At this meeting the said examiner made a report of the condition of the bank, and, among other things, the following vote was passed, viz:

"Voted, In accordance with the notice of the Comptroller of the Currency dated December 16, 1881, there be, and hereby is, laid an

assessment of one hundred per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

"Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

62 The whole number of votes cast being 5,549, representing 5,549 shares of stock, of which 5,494 were in the affirmative and 55 in the negative.

The plaintiff attended said meeting by her authorized attorney under the following proxy, which was not filed with the bank and on which no vote was cast:

"Know all men by these presents that I, the undersigned, stockholder in the Pacific National Bank, do hereby appoint J. H. Benton, Jr., true and lawful attorney, with power of substitution for myself and in my name, to vote at the meeting of the stockholders in said company, upon my forty shares of said stock, to be held at Boston, January 10, or at any adjournment thereof, with all the powers I should possess if personally present, hereby revoking all previous proxies; and this proxy does not apply to anything but my forty shares of the original stock of said bank.

"MARY J. EATON.

"Witness:
GEORGE L. THAYER."

63 Notice of said assessment and vote was forthwith given to plaintiff by said bank, but she never paid any part thereof.

The total amount paid in to said directors by the stockholders on the assessment agreed upon at said meeting, January 10, 1882, was $742,800, and was all paid in prior to May 20, 1882.

On the fourteenth day of March, 1882, the plaintiff brought this suit to recover said four thousand dollars.

March 18, 1882, by permission of the Comptroller of the Currency, the directors took possession of the assets of said bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the twentieth day of May, 1882, but made no losses or new loans during that period. The bank was closed to business on said May 20, 1882, and the directors voted to go into liquidation; and thereupon Linus M. Price was appointed receiver thereof by the Comptroller of the Currency, and continued in charge of said bank and its assets, books, papers, and records until March 18,
64 1886, when Peter Butler was appointed by said Comptroller receiver thereof in place of said Price, and said Butler has ever since been in charge of said bank, its assets, books, papers, and records.

The only authority of the bank to increase or reduce its capital was under its articles of association and the by-law hereinbefore set forth and sections 5142 and 5143 of the Revised Statutes of the United States, which were as follows:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time as

may be deemed expedient, subject to the limitations of this title; but the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency, and no increase of capital shall be valid until the whole amount of such increase is paid in and notice thereof has been transmitted to the Comptroller of the Currency and his certificate obtained
65 specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

"Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of such associations, but no reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

Any other statute laws of the United States may be considered proved as facts and referred to by either party.

Upon the trial before me I found the foregoing facts, subject to any objection by either party as to their materiality or competency, and, at the request of the parties, reserve the case for the consideration of the full court.

WILLIAM ALLEN, *J. S. J. C.*

66 " EXHIBIT A.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the sections of the Revised Statutes which authorize the organization of national banking associations, approved June 22d, 1874, and of subsequent acts in addition to or amendatory thereof, the undersigned, subscribers for the stock of said association, do enter into the following articles of association:

First. The name and title of this association shall be "The Pacific National Bank of Boston."

Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be in the city of Boston, county of Suffolk, and State of Massachusetts.

Third. The board of directors shall consist of from five to twelve stockholders, and the following persons, Leonard Whitney,
67 Jr., Gideon P. Brown, Marcellus P. Springer, John H. Sanborn, Edward C. Huxley, Moses B. Tower, Edwin Ray, Edwin M. Fowle, J. Henry Whittaker, Arthur Sewall, George C. Rand, and Abner I. Benyon, are hereby appointed directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and qualified.

Fourth. The regular annual meetings of the stockholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January of each year; but if no election shall be held on that day it may be held on any other day, according to the provisions of section 5149 of the Revised Statutes, and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with the aforesaid provisions of the said 5149 section of the Revised Statutes.

Fifth. The capital stock of this association shall be two
68 hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each, but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars; and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of electors, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association, to fix the salaries to be paid to them and continue them in office, or dismiss them, as, in the
69 opinion of a majority of the board, the interests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, under said Revised Statutes, for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

70 Seventh. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the

stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the Revised Statutes.

Eighth. These articles of the association may be changed or amended at any time by stockholders owning a majority of the stock of the association in any manner not inconsistent with the Revised Statutes, and the board of directors or any three stockholders may call a meeting of the stockholders for this purpose.

In witness whereof we have hereunto set our hands this tenth day of October, eighteen hundred and seventy-seven.

LEONARD WHITNEY, JR.
GIDEON P. BROWN.
MARCELLUS P. SPRINGER.
JOHN H. SANBORN.
EDWARD C. HUXLEY.
MOSES B. TOWER.
EDWIN RAY.
EDWIN M. FOWLE.
JAMES H. WHITAKER.
GEORGE C. RAND.
ARTHUR SEWALL.
ABNER I. BENYON.

71 EXHIBIT B.

No. 565. 40 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that Mary J. Eaton is proprietor of forty shares in the capital stock of the Pacific National Bank of Boston, Mass., transferable only on the books of the said bank in person or by attorney on surrender of this certificate.

Boston, Sept. 2d, 1880.

A. I. BENYON, *President.*

F. J. CHICK, *Cashier.*

(Transfer on back.)

For value received the undersigned hereby sells, assigns, and transfers to —— ——, of ——, — shares of the capital stock of the Pacific National Bank, being numbered —.

Given under my hand and seal this — day of ——, 18—.

—— ——.

Witness:

—— ——.

72 EXHIBIT C.

No. 790. 40 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that Mary J. Eaton, of Boston, is proprietor of forty shares in the capital stock of the Pacific National Bank of Boston, Mass., transferable only on the books of the said bank in person or by attorney on surrender of this certificate.

Boston, Octo. 1, 1881.

A. I. BENYON, *President.*

I. M. PETTENGILL, *Cashier.*

Copy.
Attest: JOHN NOBLE, *Clerk.*

73 The following is the original citation and acknowledgment of service:

74 The United States of America to Mary J. Eaton, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of said Commonwealth, within and for the county of Suffolk, wherein The Pacific National Bank, a corporation existing under the laws of the United States and having its usual place of business in said Boston, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite this sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

WALBRIDGE A. FIELD,
Senior Associate Justice of the Supreme Judicial Court of Massachusetts, the Chief Justice Being Absent from the Commonwealth.

Sufficient service of the above citation is hereby acknowledged.

MARY J. EATON,
By J. H. BENTON, JR., *Att'y.*

75 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

I, John Noble, clerk of the supreme judicial court within and for said county of Suffolk, hereby certify that the foregoing are true copies of—

I. The record.

II. The assignment of errors.

III. The application for writ of error.

IV. The opinion of the full court, annexed to and transmitted with the record.

V. The report to the full court by the justice before whom the case was heard;

VI. And of all the proceedings in said case, with all things concerning the same, together with—

VII. The original citation and

VIII. The acknowledgment of service thereon.

In witness whereof I have hereto set my hand and affixed the seal of said supreme judicial court this twenty-third day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] JOHN NOBLE, *Clerk.*

[Endorsed on cover:] Massachusetts supreme judicial court. No. 1231. The Pacific National Bank of Boston, plaintiff in error, *vs.* Mary J. Eaton. Filed October 15, 1887.

SUPREME COURT OF THE UNITED STATES.

No. 1308.

GEORGE L. THAYER, TRUSTEE IN ERROR,

vs.

PACIFIC NATIONAL BANK, PETER BUTLER, RECEIVER.

MOTION TO ADVANCE.

The defendant in error moves that the said case be advanced and set down for an early hearing at the present term of this Court. He assigns as the reason that this Court is believed to have adjudged the questions of law presented therein in the case of Delano *vs.* Butler, reported in 118 U. S., 537; says that this was one of the three hundred cases, more or less, pending in the circuit court, out of which the said adjudged case was selected as a supposed test case and brought up to this Court, the rest of them being required meanwhile to await the result. The case at bar has one element of difference, in that the plaintiff in error did not pay the assessment laid on Jan. 10, 1882, but on that day demanded back the money paid for the new stock, and another, as claimed, in that he, by his conduct prior, had acquiesced in what had been done. The only question of law raised is whether forty shares of the new stock were valid and the plaintiff in error is liable as owner on account of the same. The ground of objection alleged and relied on by the plaintiff is that the capital stock was increased to only $961,300 instead of $1,000,000, as first proposed, the same question that was argued in the Delano case, and which, as we claim and as the court below held, is covered by the doctrine adjudicated therein.

This class of litigation has become very much embarrassed by a conflict of decision between the State and the Federal courts, and it is of the greatest importance that this case should be decided at the earliest possible day, so as to dispose of that conflict. Mary J. Eaton and the plaintiff had each sued the bank to recover back the money paid by them, respectively, for the shares of new stock to which they were entitled in the proposed increase, the suits being brought in the State court before the receiver was appointed. The receiver appeared to defend the suits. When the Comptroller laid the assessment the receiver brought suits in the circuit court to enforce the same. The cases in each court depended for their determination upon the validity and ownership of the new stock.

The Eaton case came up for trial first in the State court at a time when the case in the circuit court could not be tried because of the pendency of the said test cases in this Court and after they had been advanced and set down for hearing on the first day of the next term. It was forced to trial and reported to the full court. At the law term next ensuing it was heard and determined after the promulgation of the opinion of this Court in the said Delano and the cognate cases. The case is reported in 144 Mass., 260. A writ of error was taken by the receiver, allowed by the court with a supersedeas, and is pending in this Court, the same being numbered 1231.

At the next term of the circuit court the said two circuit court actions were brought to trial, and the judge of that court held the new stock in question to be valid and to be owned by the respective parties, adjudging the law to be as held and indicated by this Court in the Delano case and otherwise than as held by the State court. In the Eaton case, however, the defendant had pleaded the adjudication in the State court as an estoppel in bar, so far as the new stock was concerned, and the circuit court, although dissenting from the law as held by the State court, upheld the plea, notwithstanding the pending of the writ of error. The receiver took a writ of error, which was allowed and is pending in this Court, No. 1309. He contends in that case that the State adjudication did not so operate, all of the other facts being agreed and in the case and the court below having found that he was entitled to recover independently of the alleged estoppel.

The Thayer case in the State court was heard and reported to the full bench in June, 1887, upon substantially the same state of agreed facts that appear in the case at bar, and if the same is heard, as it is likely to be, early in January, 1888, another writ of error may and probably will be necessary to the State court. The State court declined to await the result of the cases in the Federal courts and allowed the case to be pressed for trial. Upon the strength of the decision of the State court in said Eaton case counsel are bringing a large number of writs in the State court to recover back the money paid for the new stock and also the money paid for the voluntary assessment thereon. In this way an attempt has been made and is being made to elude the Federal courts, and that, too, while the questions raised are Federal questions. Owing to the length of time which it takes to get writs of error disposed of in this Court parties are proceeding to get adjudications in the State courts and will then, irrespective of writs of error pending, plead the same as estoppels in the circuit court cases brought to enforce the individual liability where the plea is likely to prevail as it did in the instance above named.

It is the sole province of the Federal court to construe the laws of the United States. The conflict that has arisen as aforesaid can be effectually put at an end by this Court advancing and hearing at an early day the case named as prayed for herein. That would suffice, probably, and prevent numerous other writs of error in the suits now pending from being entered in this Court. We make the motion in the case first named because it presents more squarely and

clearly the pending questions of law, but if the Court think that the three other said writs of error should be also advanced and heard at the same time the receiver would be glad of that likewise.

In cases where the parties paid the voluntary assessment laid on Jan. 10, 1882, as in the test cases decided by this Court, they have yielded, to the decision made. The only question to be determined now in said writs of error is whether the law is, as decided directly or plainly indicated in the Delano case, to the effect that the increased capital stock was valid and the parties taking shares in the same became the owners thereof.

By A. A. RANNEY, *Attorney.*

SUFFOLK, ss:

DEC'R 1, 1887.

Personally appeared A. A. Ranney and made oath to the truth of the above before me.

[Seal I. R. Clark, Notary Public, Suffolk County, Mass.]

I. R. CLARK,
Notary Public.

[Endorsed:] Supreme Court U. S. 1887, October term. No. 1308 & 1309 & 1231. Thayer, trustee, *vs.* Butler, rec'r; Butler, rec'r, *vs.* Eaton, & The Pacific National Bank *vs.* Eaton. Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed Dec. 2, 1887. James H. McKenney, clerk.

The Eaton case came up for trial first in the State court at a time when the case in the circuit court could not be tried because of the pendency of the said test cases in this Court and after they had been advanced and set down for hearing on the first day of the next term. It was forced to trial and reported to the full court. At the law term next ensuing it was heard and determined after the promulgation of the opinion of this Court in the said Delano and the cognate cases. The case is reported in 144 Mass., 260. A writ of error was taken by the receiver, allowed by the court with a supersedeas, and is pending in this Court, the same being numbered 1231.

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It is the sole province of the Federal court to construe the laws of the United States. The conflict that has arisen as aforesaid can be effectually put at an end by this Court advancing and hearing at an early day the case named as prayed for herein. That would suffice, probably, and prevent numerous other writs of error in the suits now pending from being entered in this Court. We make the motion in the case first named because it presents more squarely and

clearly the pending questions of law, but if the Court think that the three other said writs of error should be also advanced and heard at the same time the receiver would be glad of that likewise.

In cases where the parties paid the voluntary assessment laid on Jan. 10, 1882, as in the test cases decided by this Court, they have yielded to the decision made. The only question to be determined now in said writs of error is whether the law is, as decided directly or plainly indicated in the Delano case, to the effect that the increased capital stock was valid and the parties taking shares in the same became the owners thereof.

By A. A. RANNEY, *Attorney.*

SUFFOLK, *ss.*

DEC'R 1, 1887.

Personally appeared A. A. Ranney and made oath to the truth of the above before me.

[Seal I. R. Clark, Notary Public, Suffolk County, Mass.]

I. R. CLARK,
Notary Public.

[Endorsed:] Supreme Court U. S. 1887, October term. No. 1308 & 1309 & 1231. Thayer, trustee, *vs.* Butler, rec'r; Butler, rec'r, *vs.* Eaton, & The Pacific National Bank *vs.* Eaton. Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed Dec. 2, 1887. James H. McKenney, clerk.

Supreme Court of the United States.

PACIFIC NATIONAL BANK.

PETER BUTLER, RECEIVER, IN ERROR,
v.
MARY J. EATON.

TO STATE COURT.

Plaintiff's Brief.

GENERAL STATEMENT.

The question of law presented in the case at bar arose upon a statement of the facts found, and, as adjudicated in the Court below, was, whether the judgment should be for the plaintiff or defendant. The suit was brought by Miss Eaton against the Pacific National Bank, March 14, 1882, with a declaration containing two counts, one founded on a claim for money had and received ($4,000) and interest thereon; the other alleged that the money was paid on a special contract, which was not performed. She was a shareholder, on September 13, 1881, owning forty shares of a capital stock of $500,000 of the par value of $100 each, and entitled, as a pre-emptive right, to a proportional number of shares at the par value in any increased capital stock which might be determined upon. The directors, by the articles of association, were empowered exclusively, in pursuance of legal authority to that effect, given by R. S. § 5,142, to provide for an increase of the capital stock from time to time, to any sum within the maximum of $1,000,000, as they might deem expedient, and to regulate the manner in which such increase should be made, with exclusive authority to make or

unmake, or to amend, by-laws, for the conduct of the business of the bank, the pre-emptive right aforesaid of the stockholders being observed and secured (Art. 5-6, Rec. p. 24). The only by-law which they made on the subject of an increase of capital stock was this:

"Whenever an increase of stock shall be determined upon, it shall be the duty of the board to notify all the stockholders of the same, and cause a subscription to be opened for such increase; and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for, in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

(Rec. p. 17.)

The directors on September 13, 1881, passed this vote:

"*Voted*, That the capital of this Bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them."

(Rec. p. 18.)

Notice of the vote was given to the stockholders by the cashier, the money being made payable October 1, 1881, with interest to be allowed to that date on anticipated payments.

COPY OF NOTICE.

PACIFIC NATIONAL BANK,

"105 DEVONSHIRE STREET, BOSTON, Sept. 13, 1881.

"At a meeting of the Directors of this Bank, held this day, it was —

"*Voted*, That the capital of this Bank be increased to one million dollars, and that the stockholders of this date have the

right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

"J. M. PETTENGILL, *Cashier*."

(Rec. p. 18.)

No subscription paper or book was opened and circulated. The defendant in error did not subscribe, but on September 28, 1881, made an oral election and proceeded to pay the entire money for the forty shares of the new stock proposed, without subscribing, and in the assertion of, and for the purpose of securing, her said right, under such circumstances as show, according to our claim, a waiver of the provisions of the by-law and a disregard of the same in the proceedings on the part of the directors and the association. She took a receipt in the form prepared for all, stating that it was paid on account of a subscription, although none was made. It happened that all of the proposed amount was not obtained, all of the stockholders not exercising their said right. The money paid in as said capital was used as such in the business of the bank, and had been entirely lost therein before November 18, 1881, when the bank suspended business. It was proposed that the bank resume business again. It being impossible to get more capital, the directors, on December 13, 1881, voted to reduce the amount of the new capital, which had been specified in the vote of Sept. 13, 1881, to the sum paid in, and make the increase and have it approved, limited to that sum, which was accordingly done by means of a notice transmitted by the cashier, under oath, to the Comptroller of the Currency, and his certificate obtained, all as required by R. S. § 5,142. The association adopted the increased capital, limited to $461,300, and executed the plan thus modified.

The stockholders, at a meeting called and held on January 10, 1881, by an almost unanimous vote, laid an assessment on the capital stock, treating it as $961,300, thereby ratifying as we claim, the prior proceedings aforesaid, and $742,800 of the same was paid. The bank resumed business March 18, 1882, and

went on until May 22, 1882, when it failed utterly and passed into the hands of a receiver to be wound up. The defendant in error, on Jan. 10, 1882, demanded back the money paid, on the claim that it was paid on a condition not performed. She paid no part of the said assessment. Her counsel attended the stockholders meeting, representing her old stock, which she continued to hold and own until May 22, 1882. She was registered as the owner of the eighty shares in the proper books of the bank, and a certificate was issued for the forty shares of new stock paid for, ready for delivery on call, but was never called for and taken by her, while others called for and took theirs. The agreed facts in the Circuit Court case of Butler v. Eaton are more full and correct, and show more completely and accurately the *de facto* increase, and the knowledge and conduct of the defendant in error; but the questions raised and decided by the Court below are adjudicated as matter of law on a broad interpretation of the reported facts, so as to render, perhaps, the differences between the statement of the facts in the two cases unimportant.

ASSIGNMENT OF ERRORS.

We contend that the Court below erred in what they did hold, and in what they did not decide, in the conclusions reached, and in the grounds on which they were based. Stated in more detail we claim upon the facts found: 1. that the Court erred in not holding that the defendant in error became and was made the owner of forty valid shares of the new capital stock, as ultimately effected: that she became such by paying the money, her ownership being subject to defeat only in the event that the increased capital stock was not consummated by proceedings which answered the requisitions of the statute as elements of validity, — and that event did not occur; 2. that under the statutes and the articles of association, the Directors were authorized to reduce the amount to the sum paid in, and get it approved by the Comptroller of the Currency at that sum, it being impossible to get more, and that the defendant in error must be held to have paid her money in view of the existing contingencies which might lead to that, and to have been bound by the result, her individual assent to the reduction not being

essential; 3 that the vote of Dec. 13, 1881, was an authorized modification of the amount first proposed, and what was done under it in pursuance of the same, was the execution of the plan thus modified, and not an abandonment of the project; 4. that the defendant in error having paid her money as capital, without subscribing, and in waiver of the provisions of the by-law as to a subscription being opened, and having suffered it to remain as such through the proceedings had, and until January 10, 1882, and the same with the other moneys paid in, being embraced in the notice transmitted to the Comptroller of date December 13, 1881, and relied upon and made the basis of the action of that official on December 16, 1881, in giving the Certificate of that date (Rec. p. 20), she is to be regarded as a stockholder holding and owning the new shares, and is precluded from claiming that she is a creditor entitled to a return of the money as a loan or deposit, certainly as against the receiver; 5. that she is estopped from claiming otherwise by the certificate of the Comptroller of the Currency, as conclusive evidence; 6. that judgment should have been entered for the plaintiff in error; 7. that the increased capital stock as effected was legal and valid;

We claim that the Court below erroneously held to the contrary of this, and in substance and effect this:

(1.) "The vote of the Directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done and approve of the increase. We think that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock, unless $500,000 was paid in, and the Comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created;" (2) that the vote of the Directors of December 13, 1881, was in law an abandonment of the plan, and the making of a new proposal,

instead of being a modification of the original plan; (3.) that the Directors, or the Association, were bound to consummate the increased capital stock at $500,000, or to abandon the scheme, and the Comptroller had no power to approve any less sum; (4.) that there was no waiver, acquiescence or estoppel; (5.) that defendant in error was not concluded by the Certificate of the Comptroller of the Currency, and could in the suit at bar assail in detail the capital stock as increased, limited to $461.300, while they apparently held it to be valid in its entirety, as against the public, and for the purposes of the banking act, and that she stood in the relation of a creditor, as the loaner or depositor of the money; (6.) that, upon the facts found and reported, and under the laws of the United States, and the articles of association, the plaintiff in the Court below was entitled to judgment, instead of the defendant, the Court disregarding and virtually overruling the law, as held or plainly indicated in Delano *v.* Butler.

ARGUMENT.

That this case presents, and depends for its determination upon, federal questions, so as to give this Court jurisdiction, and to call upon it to review the record of the Court below, by virtue of the provisions of R. S., § 709, seems to admit of no doubt. The question is, whether the receiver or the officers of the government, holding, and charged with the disbursement of, the funds realized from the assets of the bank, under a commission from the national government, and by virtue of an authority conferred by acts of Congress, shall admit in proof the claim sued and let it share in the dividends.

The suit is aimed only at these funds, as its present and ultimate object. (Bk. *v.* Bk., 14 Wal., 383; Case *v.* Bk., 100 U. S., 446; Bk. *v.* Ins. Co., 104 U. S., 74, 76; White *v.* Knox, 111 U. S., 784.) The case depends upon the construction, force, and effect, to be given to the banking act, to wit: R. S., §§ 5140, 5141, 5142, 5143, 5205, 5151, and other provisions of the same, and the articles of association, and possibly the by-laws, and the federal laws generally, all else being only sub-

ordinate elements in construing the same. The following cases state the law as the result of the decisions.

Starin *v.* New York, 115 U. S., 248.
Carson *v.* Dunham, 121 *id.*, 421.
Hendee *v.* R. Co., 27 Fed. Rep., 678.

The reported facts are to be taken as conclusive, and the questions are totally questions of law. What the parties contended in argument in the Court below, under the practice in Massachusetts, appears only in the brief of counsel, which is not a part of the record, save so far as disclosed in the opinion of the Court. (Rec. pp. 11, 17.)

The only sensible and legal view of this case is the one indicated as sound doctrine in Delano *v.* Butler, 118 U. S., 637. The regulations of the statute (R. S., § 5742), designed for the information and protection of the public, and for the purposes of the banking act, were complied with. This made the increased capital stock of $461,300, legal and valid. Inasmuch as the whole amount first proposed was not taken and paid for, the directors had power to determine what should be done in the premises, whether to abandon the project or to make and get approved, an increase at the sum paid in. They chose the latter alternative, and the increased capital stock was effected and approved accordingly, the association adopting and carrying out the plan thus modified by the vote of December 13, 1881.

This Court, in Delano *v.* Butler, say this:

"In the present case the association did in fact finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of the Currency by his certificate approved of the increase and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000,

subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association and to the approval and confirmation of the Comptroller of the Currency." * * *

"The defendant, having paid for his shares of the proposed increase and taken his certificate without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, must be held to have done it, in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors."

The State Court rest their decision on the theory that there was an implied contract condition attached to the payment of the money, which would not admit of a reduction of the proposed increase to a less sum.

The vote of September 13, 1881, and the notice of the vote given by the association in pursuance thereof, were in no sense a proposition for a contract, but the action taken was in the exercise officially, of a power, and in the discharge of a duty. On the part of the defendant in error there was only an exercise of a pre-emptive right: there was no contract for the purchase and sale of the proposed new shares, requiring a literal or substantial performance as of a contract obligation, but quite the reverse thereof. It is unnecessary to discuss the general doctrine of implied conditions precedent in subscriptions for original stock. That doctrine, if sound, has no application to the case in hand, because it is available only as a defence to actions brought to enforce payments of a subscription. It is waived by a voluntary payment with knowledge of the facts and without fraud. There is no such rule any way applicable to payments of money and its recovery. It does not apply to subscriptions for new stock in a proposed increase of stock in a national bank, with articles of associations such as are before the Court.

An implied condition, such as is set up, would conflict with, and militate against, the free exercise of the discretionary powers conferred upon the directors by the articles, and upon the Comptroller of the Currency by the Statute. It would be against the policy of the law and express statute provisions. The reasons which gave rise to the general rule, where adopted, do not exist in the case at bar. Public policy and the law allow of an increase to any sum within the maximum. No definite sum is required to carry on successfully a business enterprise calling for its expenditure. Capital, in a bank of discount, is designed for use in making loans. No definite sum is necessarily requisite. It matters little, if at all, whether the aggregate amount is $500,000 or $461,300. Each contributor owns and holds, in either event, his aliquot share, and will get his proportion of the net earnings thereon, his relative interest in the aggregate sum being the same in either event. His money is capital stock. Capital stock is the money contributed and nothing else. The only question is, whether it is such for the purposes of the banking act, so the government cannot interfere by direct proceedings to stop operations. Under these circumstances the Court cannot find, as matter of law, that the parties understood and contracted that the increased capital stock should be $500,000 or none. (Cook on L. of S. & S., §§ 176, 7-8-9, 286, 288; Clarke v. Thomas, 34 Ohio St., 46. Morawetz, § 142, notes.)

Each old stockholder contributing the money due under his election, gets what the law gives him. After that, the only obligation resting upon the directors, is, that they shall go on and discharge their duty honestly and faithfully; upon the association, that it shall follow and adopt what they determine within the scope of their powers, and upon the Comptroller of the Currency, that he shall exercise his discretionary power faithfully.

The only event which would justify a reclaim of the money, would be a resultant stock which was illegal and valid, as was the case in,

Tube Works v. Mac. Co., 159 Mass., 11.
Reed v. Tube W., 141 Mass., 454;

or an abandonment of the enterprise before being carried into execution,

Wontner *v.* Shairp, 4 C. B., 404.
Asphitel *v.* Sercombe, 5 Exch., 147.
Johnson *v.* Goslet, 3 C. B., N. S., 569.
Watts *v.* Salter, 10 C. B., 477.
Garwood *v.* Ede, 1 Exch., 264.
Parks *v.* Ev. and Ind., etc., R. R. Co., 23 Ind., 567.
Cook on L. of S. S., §§ 76, 240, and cases in notes.
Winters v. Armstrong 37 Fed. Rep 308

Neither of which events happened. No case is found in the books to the contrary of what has been stated as the law, and in support of the doctrine that an implied contract condition is attached to the payment of the money under the circumstances.

In Pratt's Nat. Bk. (Digest), p. 19, it is said by some sensible author, I do not know who, that the amount of the increase first proposed may be reduced and consummated at the sum paid in, if the rest fails for any cause.

The Court below regard the difference between an increase of capital stock in a national bank, and a subscription for original stock, as being only in that the bank was a going concern, whereas the most vital reasons, already alluded, to are not noticed. The case at bar is *sui generis*, and the ordinary rule as established by state tribunals has no application. The money must be paid in advance, at a day to be appointed by the directors, and is like or even stronger than are the cases cited by Mr. Cook, in section 177–8. There were ordinary contingencies, the happening of which would furnish occasions calling for the exercise of a sound judgment and wise discretion, and it must be presumed that the general and comprehensive discretionary power conferred upon the directors was designed to provide for them, else the framers of the articles will be held to have stultified themselves. An attempted increase would usually fail, and operate badly. The power to abandon, before the plan is consummated, as conceded by the Court below, is greater than the power to modify the amount, and make it the sum paid in as all that could be got. The power lodged with the Comptroller of the Currency was all the safeguard supposed to be necessary.

No vested rights would be violated. Those who did not avail themselves of their pre-emptive right to new stock, forfeited the same to the association, and its officers could then do with it what was deemed best, especially if worth nothing. Instead of any one who had exerted his legal right having a right to object, the rest would have just cause of complaint, if his action or objection defeated the project, and deprived them of the benefit which might accrue in case the increased stock was perfected at the reduced sum. The Court will not put such a construction upon the articles of association and the statutes as would place the others in the power of one, or a few. An implication which would so operate would be unreasonable and unjust, and thwart the manifest purpose of the statute and the articles of association. The implication contended for, in order to cover all the contingencies and alternative occasions, would be too complicated as a presumed understanding of the parties. It would attach a contract condition to every judgment obtained in a suit brought on an election or subscription to take new stock, to which the parties were entitled by law, as well as to every payment of money, voluntary or enforced on execution, provided the whole sum first proposed was not ultimately obtained. This would be devoid of all legal principle, if not absurd. It is notorious that all old stockholders do not usually take the new stock, many of them being women, trustees, or guardians, with limited means. In case the stock was below par, it would ordinarily be impossible to increase the capital stock of any bank.

The by-law expressly provided that the directors were to determine what disposition should be made of the balance, if all was not subscribed for. This provision was not limited to a disposition by sale, nor require it in any event, if impossible. The power to make such, or any, by-law, was committed exclusively to the directors, and the articles did not prescribe any by-law on the subject of the increase of capital, nor make the exercise of their powers subject to by-laws first made, as is sometimes done. The power which authorized by-laws comprehended action without a by-law, or on occasions not specifically provided for in one when made. When the by-law made was waived, this left the directors free to act as they saw fit within the scope of the articles of association.

There is a marked and well recognized distinction between a case, as between the associate and the bank while solvent, and one where the rights of creditors have intervened by the appointment of a receiver upon its becoming insolvent, as higher rights of general creditors intervene, in claims upon a trust fund.

2 Morawetz on P. Corp., § 821.
Upton *v.* Englehart, 5 Dill., 497.
Sawyer *v.* Hoag, 17 Wall, 616.
Des Moines G. Co. *v.* West, 50 Iowa, 16, 25.
Hatch *v.* Dana, 101 U. S., 205.
Sanger *v.* Upton, 91 id., 60.
Morrison *v.* Dorsey, 48 Md., 461.
Hagar *v.* Cleveland, 36 id., 476.

In the case at bar, the money was paid as capital on a notice that interest was to be allowed until October 1, 1881. The bank had an implied right, therefore, to employ the money paid, in its business and as capital. It was suffered to remain thereafter, and to be used until January 10 1882, and this without objection. By reason of the use and loss of the money higher equities have arisen in any event, such as are recognized as a defence to an action for money had and received, when the stock proved illegal and invalid, or even where the scheme was abandoned before being carried into execution (Cook on L. of S. and S., §§ 76, 240, and notes).

The theory that no stock was created, or could be created, until the whole of the proposed amount was paid in and the Comptroller approved and gave his certificate, is purely technical and too narrow. In one sense it may be so, but in another it is not. Certain things must be done in order to comply with the statute, else the government may intervene by direct proceedings. But as between the associate and the association, the money, when paid in as capital, distinctively becomes capital stock *de facto*, with all the rights incident thereto.

The stock is created *de facto* when the increase is voted, the pre-emptive right secured by the payment of the money

under an allotment, and the entry of the names of the parties paying as owners is made on the books of the bank. It is not rendered otherwise, because certain other regulations have to be complied with in order to answer the statute in all particulars. It is stock, and there is an ownership, *sub modo* at least, although there are contingencies which may result in the abandonment of the scheme, and in a defeat of the ownership for all the purposes of the banking act. The original vote did not *per se* increase the capital stock (Terry *v.* Eagle Lock Co., 47 Conn., 141), but it was the initial step only in a course of proceeding not concluded. The stock *de facto*, ripened into stock *de jure*, when the regulations were ~~returned~~ answered.

It is idle to talk about the vote of December 13, 1881, being in design or in terms an abandonment of the plan. It is, on the contrary thereof manifestly, in design and execution, a modification of the amount only, and a consummation of the scheme thus modified, in the supposed and claimed exercise of competent authority. It was not a reduction of an established capital stock requiring a vote of the stockholders under section 5143. Morrison *v.* Price, *supra*. The proceedings are held by this court, in Delano *v.* Butler, to answer the requisitions of the law, and the stock to have been made valid, by reason thereof, and the adoption of the capital stock by the association, limited to $461,300. The association cannot be allowed to resolve itself into associates, and each one who paid his money as capital, be allowed to assail and invalidate the same in detail in collateral suits. The court below seem to have held that the certificate of the Comptroller of the Currency was conclusive as to the public for some purpose, and apparently for all the purposes of the banking act, for they indicate an opinion that the increased capital stock of $461,300 would be valid so as to subject all of the same to liability to assessment, under section 5205, on the assumption that some or all of the new capital paid in and constituting the basis of the official action taken, could be treated by the contributor as a loan or deposit, and recovered, thus creating a deficiency, as capital not paid up, or lost, or impaired. If liable to assessment under that section, it would be so under section 5151, as it seems to me, and the capital would have to be so regarded by the Comptroller in making the assess-

ment thereunder. It would present in either view, under each section, the anamolous position of there being valid stock without an owner to respond. The money paid would be treated as a loan or deposit for the purpose of recovery, and as capital stock for the other purposes.

The difficulty is that, unless it is to be regarded as capital stock once, section 5205 does not apply, for it could not otherwise be capital stock which had been impaired. It could not be capital stock so the shares could be sold for non-payment of the money, as in case of original stock on which only fifty per cent. need be paid in advance. In the theory of the Court below, the new stock was not created so as to be the subject of sale and transfer. If an assessment could be made under section 5205, to make up the amount as capital not paid, the question arises as to who would be the owner after the assessment was paid. If laid *pro rata* as required, it must be on the assumption that the capital stock, as increased, is $961,300, and all would not be paid, because there were no owners of a large part. There could on this hypothesis be no ownership by any one until all had been paid. The defendant in error would herself be liable to pay as an old stockholder her proportional part of the money which she was allowed to recover. The difficulties are inextricable. The only true theory is, that she was already the owner of the stock paid for, and is concluded as to its validity. The stockholders, whose money made up the aggregate amount, cannot be allowed to gainsay the validity of the increase and their ownership.

Casey *v.* Galli, 94 U. S., 673.
Pullman *v.* Upton, 96 *id.*, 328.
Clarke *v.* Thomas, 34 Ohio St., 46.

It is not a case where it is sought to make any one a holder of shares who did not pay the money as capital, and had never put himself in that relation by any act or contract of his own, but right the reverse thereof. It is a case where one who did pay and assume that position, now seeks to change her own relations from that of a stockholder, which had existed from

September 28, 1881, to January 10, 1882, to those of a loaner of money or depositor.

Informalities and irregularities, the general action being *intra vires*, are of no avail for a stockholder in a collateral suit. The stock can be assailed only in direct proceedings by or in behalf of the National Government.

Pullman *v.* Upton, *supra*.
Scoville *v.* Thayer, 105 U. S., 143.

The vote of the stockholders on January 10, 1882, and the action thereunder, ratified and confirmed what had been done. Had the directors acted without authority to increase capital stock, the stockholders alone holding the power, a vote on the conduct of the latter might have operated as a ratification and made their action valid.

2 Morawetz, § 626, p. 593, notes.

A fortiori where the directors had the general power exclusively, and were guilty only of an abuse or excess of authority.

Even fraud as between the stockholder and some officers of the association, or the association itself, does not relieve the stockholder as against general creditors. *A fortiori* not a secret agreement, or an implied contract condition.

Upton *v.* Triblecock, 91 U. S., 45.
Chubb *v.* Upton, 95 *Id.*, 665.
Oakes *v.* Turquand, L. R. 2 H. L., 325.
Stone *v.* Bank, 3 C. P. Div., 307.

The rule of law which raises an implied condition in a subscription has been held to so loosely that very slight things have been adjudged to be a waiver or to operate as an estoppel.

Watts *v.* Salter, 10 C. B., 477.
May *v.* Memphis B. R. R. Co., 48 Ga., 109.

Hagar *v.* Cleaveland, 36 Md., 476.
Mid. T. Co. *v.* Seman, 10 Mass., 385.
Emmit *v.* S. J. P. R. R. Co., 31 Ohio St., 23.
McCully *v.* P. & C. R. R. Co., 32 Pa. St., 25.
Clark *v.* Thomas, 34 Ohio St., 46.
Cabot, etc., B. Co. *v.* Chapin, 6 Cush., 50.
Morrison *v.* Price, 23 Fed. Rep.

In England, the extent of the discrepancy has been held to be a controlling element in several adjudications under this rule. Each case is made to turn upon its own circumstances, the party being held, if discrepancy is small.

Johnson *v.* Goslet, 3 C. B., N. S., 594.
McDougall *v.* Jersey Co. J. H. Co., 10 Jur. N. S., 1043.
Howbeach C. Co. *v.* Teague, 5 H. & N., 151.
Elder *v.* N. Z. L. I. Co., 30 L. T. N. S., 285.

It has been made a question whether payment by note would operate as a waiver, but the authorities are that it would.

Davenport & St. P. R.R. Co. *v.* Rogers, 39 Iowa, 298.
O'Donald *v.* W., etc., R. R. Co., 14 Ind., 259.
Slipher *v.* Earhart, 83 Ill., 173.

Whether payment of calls to less than the entire amount would operate as a waiver of an implied or express condition and preclude a defence on that ground to a suit brought to recover the balance of the subscription has been made a question. It depends upon circumstances; is so, if with full knowledge of a defence.

Miss. & Tenn. R. R. Co. *v.* Harris, 36 Miss., 17.
Inter. M. P. Co. *v.* Jack, 6 Pac. Rep., 20.
Hamilton *v.* Grangers' L. Ins. Co., 67 Ga., 145.

Partial payments, or payment of some assessments, have not been held to be a waiver, so as to allow of an enforced payment

of the rest, in cases where the money was paid without knowledge of the fact that the conditions had not been complied with, or under a false or fraudulent assurance that they had been.

Ridgefield, etc., R. R. Co. *v.* Brush, 43 Conn., 86.
Somersett, etc., R. R. Co. *v.* Cushing, 45 Me., 524.

The issue of waiver, and acquiescence, is covered in Delano *v.* Butler, if raised and deemed essential. It is to be found as matter of law, because of the small discrepancy and the lying idle so long after paying in the money as capital, and with no interest otherwise. It was claimed in Chubb *v.* Upton, that there were omissions and informalities justifying direct proceedings to annul the stock, and the stock was claimed to be invalid as to stockholders on that account. Negatived in Chubb *v.* Upton, and Clarke *v.* Thomas, *supra*. Here the stock is valid and incapable of being annulled by direct proceedings, and yet it is claimed to be invalid as to stockholders. Still worse as a contention, if not absurd.

We therefore respectfully submit in conclusion, that the whole reasoning of the Court below is fallacious and the conclusions unsound. They assume or try to establish a false theory, and then labor to carry it out with consistent details in application thereof. They invoke a doubtful principle of law, misapply it, and stick in the bark of the same, or seek to extend the rule beyond its legitimate limits. The opinion is more technical than wise, and magnifies objections. They ignore what is said in Chubb *v.* Upton, *supra:*

"One who receives a certificate of stock for a certain number of shares, at a given sum per share, thereby becomes liable to pay the amount thereof, when called upon by the corporation or its assignee. Nor is it necessary, to sustain the action, that there should have been a subscription for the whole amount named in the articles."

This was not a mere *dictum*, but the doctrine of prior decisions in the same and other courts was cited approvingly and squarely adopted.

They also disregard and virtually over-rule the doctrine of Delano *v.* Butler. While there was no certificate accepted in the case at bar, there was what created ownership, and was equivalent thereto. It is not necessary to cite authorities that a certificate is only one species of evidence, and not essential to ownership, or the stock itself.

We ask for the adoption here of a sound doctrine as a general rule of law, and hope that a general power which is wise and prudent on the whole, will not be destroyed or defeated by any supposed or actual abuse of the same in one instance. All that was done was to render a capital stock already *de facto*, one *de jure*, when nothing else would have been practical at best.

A. A. RANNEY.

Supreme Court of the United States.

PACIFIC NATIONAL BANK, PETER BUTLER,
RECEIVER, IN ERROR,

v.

MARY J. EATON.

WRIT OF ERROR TO STATE COURT.

Addenda to Brief.

The annexed brief was prepared and printed before the argument and decision of the case of Aspinwall in error, *v.* Butler. We need only refer to that case as decisive of the one at bar, and submit the brief already printed, with this in addition thereto. The only distinguishing fact is in that Miss Eaton did not call and get the certificate issued and made subject to her order. This, as we insist, is not material, and can make no difference, inasmuch as that was not essential to ownership, and she was made the owner of the stock, as between her and the bank, and *a fortiori* as to creditors, by the issue of the certificate and the entries made in the books of the bank, including the official list or registry kept in obedience to the express provisions of the statute (Rev. Stats., Sect. 5210).

1 Moraw. P. Corp., Sect. 56, note.
Cook on L. of S. & S., Sects. 10, 192, note.
Railroad *v.* Pearson, 128 Mass. 445.
Hawley *v.* Upton, 102 U. S. 314.
National Bank *v.* Bank, 105 U. S. 217.

The repudiation of the stock and the demand made for the money on Jan. 10, 1882, was not only virtually a refusal to take

the certificate, but a sufficient excuse for its non-delivery, if required.

It is not the case of an executory contract to sell and deliver shares of stock where a delivery or tender of the certificate was essential to a right of action for the price.

The defendant in error here, more effectually than Mr. Aspinwall, waived the opening of a subscription contemplated in the by-law, and the force thereof as to conditions, by making her election orally and prepaying the money as capital under the notice and plan adopted by the directors in disregard thereof, on the understanding that the money might be pre-paid, with liberty on the part of the bank to use it directly as capital, allowing interest to Oct. 1, 1881. Her conduct then and subsequently was inconsistent with the alleged implied condition as held in Delano *v.* Butler, and in the Aspinwall case. What was done clearly made her the owner of the stock.

If the question of jurisdiction is now raised, and is open without any motion to dismiss being made (which we deny), we submit, beyond what is said in the first brief:—

1. That here there were no independent questions, not involving federal questions, and with ground broad enough to maintain the judgment so as to justify letting the same stand as in the case of

Hale *v.* Akers, 132 U. S. 554.

The alleged implied conditions are subordinate, and depend upon the construction of federal statutes; are excluded and not allowable, under the banking act, the articles of association and by-laws, making, of course, a part thereof. They are so construed by this Court in the Aspinwall case.

2. The report of the facts found on which the case was reserved and decided as matter of law exclusively, presented a case of federal law only.

The opinion of the Court, verified and made part of the record here, as required by the rule of this Court, may be referred to as showing what was contended and adjudged.

Also. Fire Ass'n *v.* State York, 119 U. S. 110.
Murdock *v.* Memphis, 20 Wall. 590.
Gross *v.* Mortgage Co., 108 U. S. 477.
England *v.* Garland, 112 U. S. 505.
Kreiger *v.* R. R. Co. 125 U. S. 39.

Inasmuch as, upon the found facts, the right of recovery or

otherwise depended solely upon federal questions of law, sufficient appears conclusively to sustain the right to a writ of error, as allowed and recognized by the acting Chief Justice, the Judge who gave the opinion in the State Court.

Swope *v.* Leffingwell, 105 U. S. 3.
De Saussure v. Gaillard, 127 U.S. 214.

The allowance of the writ of citation by the acting Chief Justice, the judge who gave the opinion, shows a Federal question.
Adams Co. v. R. Co. 112 U.S. 123.

C. A. Ranney

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 239.

THE PACIFIC NATIONAL BANK, OF BOSTON,

PLAINTIFF IN ERROR,

v.

MARY J. EATON.

BRIEF FOR DEFENDANT.

J. H. BENTON, JR.,
Counsel for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 239.

THE PACIFIC NATIONAL BANK OF BOSTON,
Plaintiff in Error,

v.

MARY J. EATON.

BRIEF FOR DEFENDANT.

STATEMENT OF FACTS.

Sept. 13, 1881, the plaintiff in error was a national banking association under the laws of the United States, with a capital of five thousand shares, of which the defendant in error held forty shares.

Record, pages 17, 18.

The only authority of the bank to increase its capital was under Sect. 5142 of the Revised Statutes of the United States, which provided that —

> "Any association formed under this title may by its articles of association provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title, but the maximum of such increase, to be provided in the articles of association, shall be determined by the Comptroller of the Currency, and no increase of capital shall be valid until the

whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereon, and that it has been duly paid in as a part of the capital of such association."

Record, page 22.

Under this authority the bank had provided in its articles of association that its capital might be increased to any sum not exceeding one thousand shares.

Record, page 24.

The only authority of the bank to reduce its capital was under Sect. 5143 of the Revised Statutes, which provided that —

"Any association formed under this title may, by vote of the shareholders owning two thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of such associations; but no reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency, and his approval thereof obtained."

Record, page 23.

The bank had also adopted a by-law which provided that —

"Whenever an increase of stock shall be determined upon, it shall be the duty of the board to notify all the stockholders of the same, and cause a subscription to

be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

Record, page 17.

On Sept. 13, 1881, the defendant received from the bank the following notice: —

"PACIFIC NATIONAL BANK,
105 DEVONSHIRE STREET, BOSTON, Sept. 13, 1881.

"At a meeting of the directors of this bank held this day, it was voted that the capital of this bank be increased to one million dollars, and that the stockholders of this date have a right to take the new stock at par in equal amounts to that now held by them. Subscription to the new stock payable Oct. 1. Parties desiring to anticipate payment will be allowed interest to that date at four per cent per annum."

Sept. 28, 1881, the defendant in error paid to the bank four thousand dollars, and received a receipt, reading: —

"Received of Mary J. Eaton, four thousand dollars on account of subscription to new stock."

No subscription books were, in fact, opened; and the only transaction between the bank and the defendant in error was the giving of the above notice, and the payment of the $4,000 upon the above receipt.

Record, page 18.

Nov. 18, 1881, 4,613 shares of the 5,000 shares of the proposed increase had been taken by the shareholders who were entitled thereto, and the amount thereof, $461,300, had been paid to the bank.

On that date the bank failed, and the Comptroller of the Currency placed an examiner in charge and possession of its funds, assets, records and books, and he remained in the exclusive charge and possession thereof until March 18, 1882.

The whole amount of increase of capital of the bank to one million dollars was never paid in, and no notice was ever transmitted to the Comptroller of the Currency that the same had been paid in, and no action was taken by him respecting such an increase of stock.

Record, page 18.

Dec. 13, 1881, after the bank had been in the hands of the examiner for nearly a month, the directors passed a vote reciting the vote to increase the capital to one milliondollars, the fact that $461,300 of said increase had been taken and paid in, and $38,700 thereof had not been taken and paid in, and declaring —

> "that said $38,700 of said stock be and hereby is cancelled and deducted from said capital stock of one million dollars, and that the paid-up capital of this association amounts to $961,300."

They also voted at the same time that the Comptroller of the Currency be notified that the capital of the bank had been increased in the sum of $461,300, that the whole amount thereof had been paid in, and he be requested to issue his certificate of said increase.

Thereupon, on the same day, on suggestion of the Comptroller, the cashier of the bank sent to the Comptroller a copy of said vote, with a certificate that the capital stock of

the bank had been increased in the sum of $461,300, all of which had been paid in.

Record, page 19.

Dec. 16, 1881, the Comptroller sent to the directors of the bank a certificate that satisfactory notice had been transmitted to him that the capital stock of the bank had been increased in the sum of $461,300, that the amount of said increase had been paid in, and that such increase in the sum of $461,300 was approved, and at the same time sent to the bank a communication stating that the entire capital stock of $961,300 had been lost, and the bank was required to assess its stockholders one hundred per cent upon the amount of capital held by each.

Record, page 20.

No communication was made to the defendant in error, with reference to the votes of the directors of Dec. 14, or said certificate of the Comptroller, and she never assented to any change in the proposed increase of 5,000 shares, but upon receipt of this certificate from the Comptroller a certificate in her name for forty shares in said claimed increase of $461,300 was made by the bank, which still remains in the certificate book of the bank, and she was, without her knowledge, registered in the stock register of the bank as the owner of forty shares in said claimed increase.

Jan. 10, 1882, the defendant in error made written demand upon the bank as follows: —

> "The conditions upon which you received $4,000 of me on the twenty-eighth day of September, 1881, not having been performed, I hereby demand repayment of said $4,000."

Record, page 21.

March 14, 1882, the $4,000 not having been repaid by the bank, the defendant in error brought suit for it against the bank in the Superior Court of Massachusetts for the county of Suffolk.

Record, page 2.

The declaration in the suit contained two counts. The first was for money had and received. The second alleged that on the twenty-eighth day of September, 1881, the plaintiff paid the defendant $4,000 upon an agreement by it to apply the same in payment for forty shares of its capital stock in an increase thereof in the amount of $500,000, which it agreed to make within a reasonable time, and that the defendant had not so applied said $4,000.

The answer which was filed at the return term of the action, May 4, 1882, denied every allegation in the declaration, and for further answer to the second count alleged that on Sept. 13, 1881, the defendant voted to increase its capital $500,000; that the plaintiff became entitled to take forty shares in such increase upon paying $4,000 therefor on or before Oct. 1 then next ensuing, and that on Sept. 28, 1881, the plaintiff paid the defendant $4,000 "for said forty shares of new stock," and thereafter, before the action was begun, the same were placed in her name and a certificate was issued to her therefor.

May 4, 1882, upon application of the defendant therein, the cause was removed to the Supreme Judicial Court for the county of Suffolk, where it was entered at the April term, and was continued from term to term until May 5, 1886, when Peter Butler, who had in the mean time been appointed receiver of the bank, appeared and was admitted to defend the cause, in the name of the bank, and the cause was heard and reported to the full court for its consideration.

March 23, 1887, the full court ordered judgment for the plaintiff therein for $4,000, and interest from the date of the demand upon the bank for repayment, Jan. 10, 1882.

March 30, 1887, the receiver filed a motion that "a special judgment only be rendered to the effect that the amount found to be due is a just claim to be allowed in proof before the receiver," etc., and for a stay of execution on the judgment. On the same day the receiver moved that the court would order the opinion of the full court to be made a part of the record, and that a certificate be made that federal questions were raised by the defendant therein and decided adversely to him, so as to entitle him to a writ of error.

Record, pages 4, 5, 6.

April 18, 1887, the receiver filed a motion for a rehearing of the cause.

Record, page 7.

May 10, 1887, after a full hearing, the motions for entry of special judgment, as to the record, and for a rehearing, were severally overruled, and final judgment was entered for the plaintiff for $4,088 and costs, and a stay of execution was ordered.

Record, page 8.

May 16, 1887, a writ of error to this court was allowed by the senior associate justice of the Supreme Judicial Court of Massachusetts, the chief justice being absent from the Commonwealth. The errors assigned are four in number, but in reality are only one, which is that the court erred in holding that the plaintiff paid her money to the bank upon the implied condition that she should receive therefor forty shares in the proposed increase of $500,000.

POINTS AND AUTHORITIES.

I.

The record does not show that any Federal question was raised and presented to the state court, and decided by it adversely to the plaintiff in error.

The question whether a Federal question was involved was argued in the state court upon a motion by the receiver for a certificate that such a question was involved, and that motion was overruled.

Record, page 8.

The only question raised upon the pleadings was whether the defendant had applied the $4,000 in payment for forty shares in an increase of five thousand shares, as alleged in the declaration. The defendant did not set up in its answer any change in the proposed increase, or any reduction in the amount thereof, nor did it allege that the whole amount of the increase was subscribed for and paid in, and approved by the Comptroller.

No exceptions were taken to the rulings of the Court, and there is absolutely nothing in the record to show that any Federal question was raised, and decided adversely to the plaintiff in error.

No statute of the United States was set up, or claimed as a defence upon the pleadings, and therefore the decision of the state court could not have been against any right set up or claimed under such statute.

Brooks *v.* Missouri, 124 U. S. 394.

The opinion is not a part of the record. The counsel for the receiver asked the state court to order the opinion to

be made a part of the record, and that court refused to do so.

Record, pages 7, 8.

In Gross *v.* United States Mortgage Company, 108 U. S. 477, and in Adams County *v.* Burlington, etc., R. R., 112 U. S. 123, and in Kreiger *v.* Shelby Railroad Company, 125 U. S. 39, the right of this court to examine the opinion of the state court was expressly put upon the ground that under the laws of those states the opinions were required to be filed and recorded, and were therefore a part of the records in the cases. No statute of Massachusetts requires opinions of the Supreme Judicial Court to be filed or recorded, and they are no part of the record.

In Fire Association *v.* New York, 119 U. S. 110, there were no pleadings, and therefore the Court looked into the opinion of the Court of Appeals of New York, a copy of which, *as filed in the case*, was transmitted to this court under the eighth rule.

But in this case the opinion of the Supreme Judicial Court was not "filed in the case." Under the law and practice of Massachusetts, the opinion of the Court is not filed in the clerk's office, but goes to the reporter only. The clerk has no custody or control of the original opinion, and no more power to obtain it, or a copy of it, than anybody else, therefore it cannot be transmitted as "filed in the case," under the eighth rule of this court.

But even if the opinion of the court can be properly examined to ascertain whether a Federal question was raised and decided adversely to the plaintiff in error, it will be found by examination of it that no such question was considered by the state court.

The only question of law decided by the state court, or which could arise upon the pleadings therein, was the com-

mon-law question as to whether, in case of a subscription and payment for stock to be thereafter created, *i. e.*, for stock in an increase of capital, which can come into existence only upon the happening of certain future events, such as the payment of the whole amount of the proposed increase, and an approval by the Comptroller of the increase thus paid in, there is an implied condition that the person making the payment shall receive therefor shares in an increase *such as is proposed*, *i. e.*, that all the shares proposed to be created shall be created, so that the person making the payment shall become an associate in the enterprise *which is contemplated when he makes his payment*. The state court held that there was such an implied condition, and that "upon the ordinary principles of contract if the plaintiff paid in her money for forty shares of stock on the condition that five thousand shares of stock should be created, she could not be bound to take the forty shares if the condition was not performed."

It is true the opinion indicates that the defendant in the state court argued that the change of the proposed increase from an increase of five thousand shares to an increase of four thousand six hundred and thirteen shares was an immaterial change, to which, upon the facts, the plaintiff must be held to have assented, and also that the certificate of the Comptroller was conclusive evidence that the plaintiff was a shareholder, and not a creditor in respect to the four thousand dollars.

The questions of materiality and of assent were really only questions of fact; besides the defendant's answer did not refer to the Comptroller's certificate or to any increase but the proposed one of five thousand shares, which the certificate did not mention.

Again, it is plain that the obligation of the plaintiff to take the new shares depended upon her contract, and not

upon whether the Comptroller should subsequently decide to treat her as a shareholder, when, under her contract, she was not.

It may be said that the opinion shows that the state court construed Sects. 5140 and 5142 of the United States Revised Statutes, and that this was a decision of a federal question. But there was no contention as to the construction of these sections. It was not claimed that they meant anything except what their plain terms import, *i. e.*, that no increase in the capital stock is valid until the whole amount thereof has been paid in and approved.

II.

The decision of the state court that the bank received the money of the defendant in error upon an implied promise to give her forty shares in an increase of five thousand shares was correct. An increase of the capital of a national bank depends solely on a compliance with the conditions of the Act of Congress and articles of association, not on any arrangement between the bank and its shareholders or other persons.

United States Revised Statutes, § 5142.

Charleston *v.* People's Nat'l Bank, 5 South Car. 103, 115.

To create an increase in the capital of the bank, it was necessary, *first*, that the directors should vote to increase the shares to a certain number within the limit provided by the articles of association; *second*, that the increase of shares thus voted should be all subscribed *and paid for; third*, that the Comptroller of the Currency should certify his approval of such increase, and that it had been duly paid in

as a part of the capital. *Until these three things were all done, no shares in any proposed increase could exist.*

The vote to increase the capital by the issue of five thousand new shares, and the offer to the defendant of forty shares of such five thousand new shares at par, did not *create stock.* It was only a declaration by the bank that it would increase its capital by the creation of five thousand new shares, *if* that number of new shares were subscribed and paid for, and *if* the Comptroller approved such increase: and an offer to issue to the defendant forty shares of such five thousand shares of new stock, *if* the whole five thousand new shares were subscribed and paid for, and *if* the Comptroller approved such increase, *i. e.*, if such five thousand share *were created.*

The payment by the defendant on the 1st of October was an acceptance of this offer, and created a contract between her and the bank, by which it promised to issue to her forty shares of such five thousand new shares, if the whole five thousand were subscribed and paid for and the Comptroller approved their issue, and by which she promised the bank to take forty shares of such proposed increase of five thousand shares, if the whole five thousand were subscribed and the Comptroller approved their issue, *i. e.*, if such five thousand shares *were created.*

Spring Company *v.* Knowlton, 103 U. S. 49.

It was upon this implied contract to issue and to take forty shares of stock in the proposed increase of five thousand shares, if such shares were created, that the defendant paid to the bank four thousand dollars. If the whole five thousand shares were not subscribed and paid for, or if the Comptroller refused to approve their issue, no such shares as were paid for could be created, and the bank was under no obligation to issue any shares to her, and it necessarily follows that,

unless the whole five thousand shares were subscribed and paid for, and the Comptroller approved the issue of them, she was under no obligation to take forty shares of any other increase which might be voted, subscribed and paid for and approved.

The contract which arose between the defendant and the bank when the four thousand dollars was paid was an executory one on the part of the bank, and as the bank became unable to perform it, it was properly held liable to pay back the money which it received upon it. The bank received the money to be applied to a certain purpose, *i. e.*, the payment for forty shares in an increase of five thousand shares, *if such increase was made*, and it impliedly agreed to repay the money if it was not thus applied. Until the money was thus applied, and the defendant did receive forty shares of stock in an increase of five thousand shares, it was held by the bank as money had and received to the plaintiff's use. This is not a case of payment for shares which the corporation owned and had a right to sell, as in Nutter *v.* Lexington & Cambridge R. R., 6 Gray, 85, 89, and other like cases, but is a case of payment on account of shares *to be afterwards created*. The defendant was entitled to the thing which she agreed to take, *i. e.*, to forty shares *in an increase of five thousand shares*.

It is claimed, however, that the stock was subsequently increased by four thousand six hundred and thirteen shares; that the defendant became the owner of forty shares in such increase; and that this was a performance of the contract of the bank to apply her money to the payment for forty shares in the proposed increase of five thousand shares.

If the defendant, knowing that the directors had voted to create only four thousand six hundred and thirteen shares instead of the five thousand shares which they had notified her

they intended to create it, and that only that number had been subscribed and paid for, and that the Comptroller had approved an increase of that number, had taken a certificate for forty shares in that increase in performance of the contract of the bank to give her forty shares in an increase of five thousand, and had acted as a holder of shares in that increase, as was the case in Delano *v.* Butler, 118 U. S. 634, and Aspinwall *v.* Butler, 133 U. S. 595, clearly she would not have been entitled to recover her money.

But as she did not know this, and never assented to any change in the proposed increase of five thousand shares, never received any certificate, never knew that any certificate was made in her name, and never acted as a holder of shares in such increase, it is difficult to see how the *post-mortem* action, by which the directors of the bank and the Comptroller seem to have conspired to trap subscribers for shares in an increase of five thousand shares into an acceptance of shares in a different increase, can have any effect upon her rights and the bank's obligation under the contract which was made between her and the bank when she paid her money to it on Sept. 28.

The condition upon which the bank received the defendant's money, *i. e.*, that it would apply it in payment for forty shares of stock in an increase of five thousand shares, was not a mere technical condition, but was of the essence of her contract, and prescribed important limitations of the liability which she would assume as a holder of the shares the bank agreed to give her.

Stockholders in national banks are individually responsible for all contracts, debts and engagements of the bank to the extent of the amount of their stock therein at its par value.

U. S. Rev. Stats., § 5151.

If the defendant took forty shares in the proposed increase of five thousand shares, she assumed one one hundred and twenty-fifth part of the obligation resting upon that five thousand shares to make up any impairment of the capital. If she took forty shares in an increase of forty-six hundred and thirteen shares, she assumed an obligation to pay substantially one one hundred and fifteenth part of the amount necessary to repair any impairment of such increase. The attempted application by the bank of her money to the payment for forty shares in an increase of forty-six hundred and thirteen shares, instead of the payment for forty shares in an increase of five thousand shares, was really an attempt to make her take forty-three shares when she had only agreed to take forty.

People's Ferry Co. *v.* Balch, 8 Gray, 303, 314.
Katama Land Co. *v.* Jernegan, 126 Mass. 155.

It would seem to be too plain for contention that no shares in a proposed increase of the capital of a national bank can come into existence till the whole amount thereof is paid in. Such is the plain reading of the statute: "No increase shall be valid until the whole amount of such increase is paid in," etc., and whether, as has been said by the Court, this was intended to secure the actual payment of the stock subscribed, and thus prevent stock-watering, or, as may equally well be said, was intended to protect persons who paid their money for shares in a proposed increase from being compelled to take shares in a different increase, is of no consequence.

It effects both results, and the one is as much within its intendment as the other. If the purpose was simply to "secure the actual payment of the stock subscribed," it would have been accomplished by a simple provision that

none of the shares subscribed for in an increase should be issued until the whole amount *of such shares* is paid in. The language used, however, is much broader, and seems plainly intended to provide that persons who have paid for shares to be created in one increase in which they are willing to participate shall not be required to take shares in another increase in which they are not willing to participate.

If it was a case of subscription to original capital under a charter which provided that no capital stock shall be issued until the whole amount of the capital has been subscribed for the authorities are uniform that a subscription for shares would not be binding until the whole amount of the capital was subscribed.

Santa Cruz Railroad Company *v.* Schwartz, 53 Cal. 106.

Bray *v.* Farweil, 81 N. Y. 600.

New York, Housatonic, etc., Railroad Company *v.* Hunt, 39 Conn. 75.

Read *v.* Memphis Gayoso Gas Co., 9 Heiskell (Tenn.), 545.

Fry's Executor *v.* Lexington, etc., Railroad Company, 2 Mete. (Ky.) 323.

Shurtz *v.* Schoolcraft & Three Rivers Railroad Company, 9 Mich. 269.

Swartout *v.* Michigan Air Line Railroad Company, 24 Mich. 389.

Livesey *v.* Omaha Hotel Company, 5 Neb. 50.

Hale *v.* Sanborn & Follett, 16 Neb. 1.

Selma, Marion, etc., Railroad Company *v.* Anderson, 51 Miss. 829.

Hughes *v.* Antietam Mfg. Co., 34 Maryland, 317.

Topeka Bridge Co. *v.* Cummings, 3 Kan. 55.

Littleton Mfg. Co. *v.* Parker, 14 N. H. 543.

New Hampshire Central R. R. Co. *v.* Johnson, 30 N. H. 390.

Contoocook Valley Railroad Co. *v.* Barker, 32 N. H. 363.

Peoria & Rock Island R. R. Co. *v.* Preston, 35 Iowa, 115.

Haskell *v.* Worthington, 94 Mo. 560.

Somerset & Kennebec R. R. Co. *v.* Cushing, 45 Me. 524.

Somerset Railroad Company *v.* Clarke, 61 Me. 379.

Jewett *v.* Valley Railroad Company, 34 Ohio St. 601 to 607.

Winters *v.* Armstrong, 37 Fed. Rep. 508.

Wontner *v.* Shairp, 4 C. B. 404 at 441.

Elder *v.* New Zealand Land, etc., Company, 30 L. T. Rep. 285.

Pitchford *et al. v.* Davis, 5 M. & W. 2.

Allman *v.* Havana, Rantoul & Eastern Railroad Company, 88 Ill. 521.

Hendrix *v.* Academy of Music, 73 Ga. 437.

Ambil Mining Co. *v.* Sherman, 42 N. W. Rep. (Wis.) 226.

Salem Milldam Corporation *v.* Ropes, 6 Pick. 23.

Katama Land Co. *v.* Jernegan, 126 Mass. 155.

But it is said by the plaintiff in error, that whatever may be the rule in other courts, in the Federal courts the rule is that, in case of a subscription to stock to be created, there is no implied condition that there shall be a subscription for the whole amount of the increase. Until the cases of Aspinwall *v.* Butler and Delano *v.* Butler, Chubb *v.* Upton, 95 U. S. 665, was the only case cited to this point. This was a case where a person was held as a subscriber to an increase to the capital of an insurance company who paid

a portion of his subscription, was elected a director and acted as such, acted as stockholder upon the shares of the increase, and acted as a president of a branch company, and the Court said that he was estopped to say that he was not a stockholder in respect to shares upon which he had thus acted, or to show that they were irregularly issued; and incidentally, in the opinion of Mr. Justice Hunt, it was said: "It is not necessary, to sustain an action to recover the amount of stock of a person who has received a certificate therefor, that there should have been a subscription for the whole amount named in the articles." The remark was unnecessary to the decision of the case, and was evidently regarded so by the Court. It cited a case in the Supreme Court of New York (21 Barb. 56), where in passing upon a subscription to the stock of a plank road corporation, organized under the New York Corporation Act of 1847, it was held that a subscription to the full amount of the stock named in the articles of such a company was not a condition precedent to the liability of the subscriber, citing Hamilton Plank Road Company *v.* Rice, 7 Barbour, 166, which case when examined will be found to put the liability of the subscriber upon the construction of the Act of 1847, to the effect that that act did *not* make the subscription of a certain amount of stock a condition precedent, and that therefore the agreement of the defendant to pay "as soon as the amount of stock *required by said act* should be subscribed" could be enforced, although the whole amount of the capital fixed by the articles of association was not subscribed. This case not only draws the true distinction between cases where the subscription of a certain amount of stock is made by the terms of the act of incorporation or the general law *a condition precedent to the existence of valid stock* and where it is not, and holds, as was held in Nutter *v.* Lexington R. R., 6

Gray, 85, that *unless* the law requires the stock of the corporation to be all subscribed for before it is created, there is no implied condition that all the stock created shall be subscribed for. But it cites and confirms the doctrine of Salem Milldam Corporation *v.* Ropes, 6 Pick. 23, 9 Pick. 187, and Central Turnpike *v.* Valentine, 10 Pick. 142, that where the law does require all the stock to be subscribed before any of it is valid, there is such an implied condition attached to each subscription for such stock. So that when the *dictum* in Chubb *v.* Upton is followed to the original authorities upon which it is based, it is found to apply only to cases where the subscription or payment of the whole amount of the capital is *not* made a condition by the law organizing the corporation, or permitting an increase, in case of an increase of capital.

But in case of an increase of the capital stock of a national bank, the validity of the proposed increase is contingent upon its all being subscribed for. The statute is explicit. There can be no increase unless the whole amount thereof is subscribed for and paid in, and therefore, if it is not all subscribed for, the contingency, upon the happening of which alone the shares subscribed for can come into existence, does not happen, and the subscriber cannot receive the shares which he bought.

The defendant did not become a shareholder in the proposed increase at once upon her payment to the bank.

If she had demanded a certificate at that time it could not have been issued to her, because the stock for which she paid *was not in existence.*

The payment did not constitute her a shareholder, but was only a payment for shares proposed to be created. What shares were then proposed to be created?

Plainly, under the law, shares *in an increase of five thousand shares.*

If the bank, *without assuming to act in respect to any change in the proposed increase*, had afterwards tendered the defendant shares in an increase of less than five thousand shares, clearly it would not have tendered her what she had paid for, and it had agreed to give her, and she would not thereby have become a shareholder in such less increase unless she had accepted such shares in the less increase as a performance of the agreement, which it is not claimed she did.

In Delano *v.* Butler the plaintiff did accept shares in the less increase as a performance of the contract to give him shares in the increase of five thousand shares, and was therefore held to have thereby become a shareholder.

In Aspinwall *v.* Butler the plaintiff had also accepted a certificate of shares in the less increase, and could not say he was not a holder of such shares.

He accepted his certificate Nov. 5, 1881, and held it until May 22, or more than six months, before he offered it back, or took any action to repudiate his acceptance of it.

Clearly, he had accepted the stock in performance of the contract of the bank, and had become a holder thereof, and liable to assessment thereon. The case might well have been decided upon this ground, but the opinion goes farther, and puts the decision upon grounds which it is claimed require the decision of the State court in this case to be reversed.

Under it, the following claims are made: —

First. That as the directors had, under the by-laws, the right to dispose of the privilege of subscribing for any new shares not subscribed for by the original stockholders within the time fixed by the notice to them, they could, at the expiration of the time, cancel such privilege, and thus change the proposed increase of five thousand shares into an increase of as many shares only as might have been sub-

scribed for within the time limited; and therefore the defendant, when she paid her money for forty shares in the proposed increase, did not pay it for forty shares in an absolute increase of five thousand shares, but for forty shares in an increase of such less number of shares as might be actually subscribed for within the limited time, if the directors should exercise their power to change the increase to that less number of shares by cancelling the privilege of subscribing to the remainder.

It is obvious that if this was the case the defendant might have been made the only stockholder in the increase; for if the directors had a right to cancel the privilege of subscription to any of the new shares not subscribed for by her, they had the right to cancel the privilege of subscribing to all of them. The defendant's contract would thus be made a contract to take all the shares of the increase if no other shares should be subscribed for within the time limited, and the directors should see fit to cancel the privilege of subscribing for all the other shares in the proposed increase, and the Comptroller should approve an increase only of the shares subscribed for by the defendant. A construction of the by-laws which leads to such a result is certainly not to be favored. But is this the fair construction of the by-law giving the directors the right to "determine what disposition shall be made of the *privilege of subscribing for the new stock*," *i. e.*, the new stock not subscribed for by "any stockholder who shall fail to subscribe for the new stock to which he may be entitled" within the reasonable time stated in the notice to him of his privilege to subscribe for it?

This by-law does not contemplate a cancellation or destruction of the privilege, but a disposition of it to some one who will exercise it. It authorizes the directors to *dispose* of the privilege, not to *destroy* it. Its purpose is plainly *to cause*

all shares in the proposed increase to be subscribed for and taken, if not by the stockholders who are entitled to them, then by some one else. It is designed to *accomplish the increase voted*, not to *change that increase to a different one*. It would also be a sufficient answer to this suggestion to say that, as the directors had not stated in the notice to the stockholders any time within which they might exercise their privilege to subscribe to the new shares, they had no power even to dispose of the privilege.

But there is still another objection to this contention, which is, that under the law the Comptroller could do nothing with reference to the proposed increase of five thousand shares except to *approve or disapprove*. He had no power to say, "I will approve a less sum than has been voted. You have voted an increase of five thousand, stockholders have paid in their money upon the basis of that vote, and that increase to the amount of $200,000 or $300,000, or in this case $461,300, I therefore approve, not the increase which the association through its directors proposed to make, and to which these stockholders were asked to pay their money, and did pay it, but the increase which has been paid in." True it is, that the directors might by another vote authorize another and a different increase of the capital, and if, acting upon the basis of that vote and that proposed increase, the amount of it was paid in, the Comptroller could approve that. But that would be an abandonment of the first proposed increase, and necessarily a release of all who had subscribed to that, and the adoption of a new increase to which nobody would be bound to subscribe, and to which nobody's money could be applied, who did not understandingly agree that their money should be so applied.

Second. That by the articles of association, the defendant in error, with other stockholders, committed the

whole matter of an increase of the capital stock within the maximum prescribed by law to the directors, and gave them discretionary power to provide for such increase, and to regulate the manner in which it should be made, and that this discretionary power attached as a condition to the payment which was made by the defendants, so that the directors could modify the proposed increase and change its amount without the consent of those who had paid in their money or had subscribed to the increase as originally voted.

This I submit is contrary to the plain reading of the statute and of the articles of association and by-laws of the bank. The fifth article of the association provides that "each stockholder shall have the privilege of subscribing for such number of shares of the *proposed increase* of the capital stock as he may be entitled to, according to the number of shares owned by him before the stock is increased." This clearly means that the proposed increase shall be determined and fixed by the vote of the directors providing for it. Otherwise, it would be impossible to fix the number of shares to which the stockholder would have the privilege of subscribing. If the amount of the increase is not fixed by the vote, but is left to be modified by the directors, and subject to reduction, if, in the course of natural events, it becomes necessary and proper, then it is impossible to know how many shares each stockholder is entitled to subscribe for.

The articles of association and the common law give to each stockholder the privilege of subscribing "for such number of shares" of the proposed increase as he may be entitled to according to the number of shares owned by him before the increase; but unless the number of shares in the proposed increase is definitely fixed and determined by the vote to increase, the stockholder's privilege is to subscribe, not for

a certain number of shares, but for an uncertain number, and it is impossible for any definite subscription to be made.

Upon this theory, the subscription made by a stockholder in case of a proposed increase would not be, "I subscribe for so many shares in the proposed increase" (being the proportionate number to which the stockholder is entitled), but, "I subscribe for such number of shares in any increase which the directors may in their discretion hereafter make, within the maximum of the amount they have voted to make, as the number of shares which I own in the original capital bears to the number of shares in the increase which the directors may thus establish." If this was the intention of the statute, would it not have been thus stated? How can the general expression in article sixth of the by-laws, that the directors shall have power "to provide for the increase of the capital of the association, and to regulate the manner in which such increase shall be made," be said to give the directors power to provide for an increase to a definite amount, and then, after subscriptions and payments have been made for stock to be created in such an increase, to change the amount thereof, and hold those who have subscribed and paid to the increase provided for, to another and different increase within the maximum amount originally voted?

The language is, "to provide for *an* increase of the capital," which means to provide for a definite increase, an increase upon the basis of which the number of shares to which each stockholder is entitled therein may be definitely fixed, so that his privilege of subscribing for such number of shares in the proposed increase as he may be entitled to according to the number owned in the original capital may be definitely ascertained and exercised, and he may become liable by subscription or agreement to pay a definite sum. Further language is, "and to regulate the manner in which

such increase shall be made," *i. e.*, an increase which has been provided for definitely by the vote of the directors. If a discretionary power cannot be drawn from the language, "to provide for an increase of the capital," standing alone, it cannot be drawn from the remainder of the sentence which is subordinate thereto, and provides that the directors "may regulate the manner in which *such* increase [that is, the increase provided for] shall be made."

Again, the by-law (Sect. 11) obviously goes upon the assumption that the increase to be determined upon by the directors by vote shall be the increase to be made, if any increase is made. It goes upon the ground that each stockholder shall have a right to subscribe to a definite number of shares of stock in the increase in proportion to his existing stock, and not to an uncertain amount to be subsequently fixed by the directors by a modification of their original vote, and a reduction of the original amount determined upon. This is rendered certain by the provision that "if any stockholder shall fail to subscribe for *the amount to which he may be entitled* within a reasonable time, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock," *i. e.*, of the new stock to which the stockholder, who has neglected to subscribe, is entitled to subscribe. If the amount to which the stockholder was entitled to subscribe was an indefinite amount, depending upon what the directors might subsequently do with reference to the amount of increase, it would be utterly impossible to determine the amount to which the stockholder was entitled to subscribe, and ascertain whether he had exercised his privilege of subscribing for all that he was entitled to subscribe for, and if not, what number of shares, for which he was entitled to subscribe, he had failed to subscribe for, so that the privilege of subscribing

for the same could be disposed of to somebody else. The plain and necessary construction of this by-law is, that when a definite increase has been determined by the directors, *that* shall be taken to be the increase which is to be made. In no other way can the by-law be made workable or sensible. The true construction of the law and of the articles of association (which are the same in all national banks) is that adopted by the Supreme Court of South Carolina in Charleston *v.* People's National Bank, 5 So. Carolina, 103, which is, that stock does not come into existence in an increase of national bank capital until the whole amount of the increase determined is paid in, and the certificate of the Comptroller approving and specifying the amount of it is obtained, and until that time the money paid in on account of shares in the proposed increase, *is a debt due by the bank to the persons paying the money.*

But it is said that the act of the Comptroller in approving the increase of 4,613 shares, and his certificate that the capital had been thus increased and paid in, is conclusive upon everybody; so that whether the directors had power to change the increase without the consent of the defendant or not, as they assumed to do it and the Comptroller assumed to approve their action, the defendant who paid her money to an increase of 5,000 shares was thereby made a shareholder in an increase of a less number of shares.

If the directors had discretionary power to modify the increase, that is the end of the whole contention; but if they did not, certainly the Comptroller, a mere administrative officer, clothed only with power to examine into certain facts and certify that they exist, and approve or disapprove a certain thing which has been done, and not to adjudicate upon the effect of it, could not have discretionary power to make persons who had subscribed to stock in a certain

increase subscribers to or shareholders in another and a different increase. If the directors could not do this, certainly the Comptroller could not, and if neither alone had this power, they did not have it together.

The action of the directors is independent of the Comptroller, and his action is independent of theirs in the nature of things, and by the obvious intention of the statute the directors are to do cause to be brought about by subscriptions and payment a definite increase, and the Comptroller is simply to approve or disapprove *that increase*, and to certify upon examination that it has been paid in as a part of the capital. If the acts of the directors, in assuming to change or or modify the proposed increase from 5,000 shares to a less number, without the assent of the defendant, did not, as a matter of law, *alone* bind the defendant, the mere administrative act of the Comptroller could not change or affect in any way the rights of the defendant under her previous contract with the bank.

Again, it is conceded that the alleged discretionary power of the directors to modify the proposed increase and change it without the consent, and logically *against the objection*, even, of shareholders who have paid in their money upon the basis of the increase proposed, *does not operate with reference to subscriptions or payments by persons who are not original stockholders*. The claim is, that this discretionary power arises from the articles of association *as applied to the relation existing between the original stockholders and the directors*, and does not reach to persons who subscribe or pay for stock in a proposed increase, who are not original stockholders and did not participate in the choice of the directors under the articles of association and by-laws. If this be so, then the person who buys from a stockholder his right or privilege to subscribe for new stock, obtains some-

thing different from that which the stockholder sold; the privilege which he buys, the right of subscription which he obtains, is, in his hands, a different legal power, a thing of greater legal value, than it was in the hands of the stockholder, which obviously cannot be the case.

But the plaintiff in error also says that no contract whatever arose between the bank and the defendant in error, when she paid her money to it upon its proposition to give her forty shares of stock in the proposed increase; and to establish this proposition counsel attempted, in the state court, to draw a distinction between the relation which arises between a stranger to a corporation, who pays money to it for stock to be created in an increase of its capital, and a stockholder in the corporation who does the same thing. Conceding, apparently, as must be conceded, that a contract arises between the corporation and a stranger upon such a payment, by which the corporation agrees to give the person making the payment shares in the increase contemplated and proposed, he denies that any such contract relation arises upon a similar payment by a stockholder. No such distinction exists, or has ever been suggested in any decided case, or by any respectable text writer. Cook on Stock and Stockholders, Sect. 288, cited by the plaintiff in error in the state court, simply states the familiar doctrine that stockholders who have subscribed for an increase in the capital, *accepted certificates therein, and received dividends thereon*, are estopped from setting up any irregularity or illegality in the manner of increase; and the same authority, in discussing the pre-emptive right of shareholders to take a proportionate number of shares in an increase of the capital of the corporation, gives no such effect to that right as is sought to be given to it by the plaintiff here, but simply states the familiar rule that origi-

nal shareholders have a right to participate proportionately in any actual increase of the capital, and are entitled "to offer to subscribe for and to demand from the corporation such a proportion of the new stock as the number of shares already owned by them bear to the whole number of shares before the increase." But this right is a right to subscribe and pay, that is, to contract for stock created or to be created, and not a right which, if exercised, puts the shareholder exercising it in any different position with reference to the responsibility of the corporation to him upon his subscription or the receipt of his money, than it is placed in with reference to its responsibility to any other person who subscribes and pays money for stock.

If, as in Nutter *v.* Lexington Railroad, 6 Gray, 85, the stock, at the time of the payment, has been created either by act of the legislature, accepted by the corporation, or by vote of the corporation under the authority of the legislature, so that nothing more is to be done to make the stock which is paid for *valid stock*, then, of course, there is no implied condition that all the stock which has been created shall be subscribed for or bought, and whether the stockholder exercises his pre-emptive right to take his proportionate part of the stock which is created and in existence by subscribing for and agreeing to take and pay for it at some future day, or by paying for it at the time, there is in either case no implied condition attached to his payment or subscription to the effect that all the stock created shall be taken and paid for. It is a mere case of the disposition by the corporation of stock which *is in existence to be disposed of*, but which the corporation is by the common law bound to dispose of proportionately to such of its original shareholders as elect, within a reasonable time, to take it. But in case of an increase to be made which,

by the terms of the law under which it is to be created, cannot become valid until it has all been subscribed and paid for, and the government, through some officer, has approved its creation, the pre-emptive right to take is a right to take or subscribe upon precisely the same conditions which are implied in the case of a taking or subscription by persons who are not original shareholders. The stockholder has the right, in such a case, to contract with the corporation to pay it the par value of the proportionate number of shares to which he is entitled when such shares shall be created and given to him; and such a subscription or contract is necessarily affected with the implied condition that shares, such as are proposed to be created, shall be created, *i. e.*, with the implied condition that the stockholder subscribing or paying in advance for stock to be created *shall have such stock as he subscribes or pays for*. The pre-emptive right is simply the right on the part of the shareholder to make with the corporation precisely the same contract, with reference to stock created or stock to be created, as an outsider may make, if the corporation sees fit to permit him to do so. As to the original stockholder, the corporation is bound to issue to him his proportionate part of the increased capital. As to the outsider, it is not; but in either case, a payment by the shareholder, or a payment by the outsider, in a case of stock to be created, necessarily implies that the stock which is to be created, shall be such stock as is contemplated by the corporation and the party making the payment at the time the payment is made. The only difference between the outsider and the stockholder is, that the stockholder has a right to demand that the corporation shall make this contract with him, and the outsider has not.

In this case, therefore, when the defendant went to the bank and paid money for stock to be created, which might

or might not come into exis ence, although she did it by virtue of her pre-emptive right as an original stockholder, the relation which was created between the bank and her upon the exercise of that right by the payment of the par value of the shares to which she would be entitled, if the stock was created, was exactly the same as would have arisen between a stranger who had purchased her pre-emptive right to subscribe for such stock, and that relation was necessarily a contract relation. If the increase contemplated at the time of the payment had been made and the stock which the defendant paid for had come into existence, and the bank had refused to deliver it to her, she could have maintained an action against the bank for failure to perform its contract, precisely as an outsider could have done. If it was not made and the stock contracted for did not come into existence, the bank could not give her what it had agreed to, and was bound to refund her money.

J. H. BENTON, JR.

Supreme Court of the United States.

OCTOBER TERM, 1887.

PACIFIC NATIONAL BANK CASES.

THE PACIFIC NATIONAL BANK OF BOSTON, Plaintiff in Error, *vs.* MARY J. EATON.	1231.
GEORGE L. THAYER, Trustee, Plaintiff in Error, *vs.* PETER BUTLER, Receiver, &c.	1308.
PETER BUTLER, Receiver, &c., Plaintiff in Error, *vs.* MARY J. EATON.	1309.

MOTION TO ADVANCE.

Peter Butler, receiver, asks leave, and hereby presents a motion, that the three said cases be advanced to be heard on the first day of the October term, 1888, or on such a day thereafter as the court may determine. A motion to advance one of them specially, to be heard at the present term, was made prior and denied for reasons not given and unknown to him. It may have been because of objections made by the other side. He now begs leave to make the present as a modified motion with material facts verified.

The objections seem now to be removed or obviated, and the counsel for the other side says he will join in a motion

to advance the cases and have them heard as above asked, as will be seen by the letter filed herewith and a copy of which is annexed hereto. The three cases involve and present one and the same general question which is common to them all, and may well be embraced in one argument not exceeding in length more than one hour on a side. One or two special and subordiate issues are named hereinafter. The counsel for the receiver is willing to submit the case upon the brief without oral argument. The other side desires an oral argument, as the receiver is informed. One of the cases is a writ of error to the State court and the others come from the circuit court of the district of Massachusetts. The general facts are presumably familiar to this court as they are the same as those presented in the case of Delano *vs.* Butler, 118 U. S., 637. The directors, on September 13, 1881, voted to increase the capital stock of the Pacific National Bank to the extent of $500,000, but the amount of the ultimate increase, as consummated by a vote of December 13, 1881, was only $461,300, no more than that sum being paid in or obtainable.

The said Eaton and Thayer each owned forty shares of the old stock and by virtue thereof were entitled to the same number of the proposed new stock. They made a verbal election and paid the money as capital without making any subscription; the shares paid for were carried to their credit as owners in the books of the bank, and certificates were executed and issued, ready for delivery on call, but were never actually delivered because not called for. After the proposed increase of the capital stock was reduced and fixed at $461,300, and the Comptroller of the Currency had ratified and confirmed the same by his approval and approval certificate, to wit, on January 10, 1882, they demanded back their money, on the alleged ground that there was a condition not answered, and commenced suits in the State court on March 14, 1882, to recover the same. The State court decided that said Eaton was entitled to recover the money,

on the ground that there was an implied condition not complied with, that the increase should be $500,000 or none. The receiver took a writ of error, which is the first one of the said suits. The case of said Thayer is pending in the State court, upon questions of law raised upon the facts agreed and found, and has been ordered to be continued on the motion of the receiver to that effect, owing to the pendency in this court of the said writs of error. The other two cases were brought by the receiver to enforce the individual liability of the said parties on account of eighty shares alleged to be owned by each, forty shares of the old, and forty shares of the new stock. The circuit court gave judgment in the case of said Thayer for the full amount of the assessment claimed, holding the new stock to be valid, and him to be the owner of the same, and he took the writ of error. In the Eaton case the Court held the decision of the State court to be erroneous, but gave effect to the adjudication as an estoppel in bar, so far as the forty shares of new stock were concerned, notwithstanding the pendency of the writ of error, with a supersedeas. The receiver excepted and took a writ of error.

The controverted questions of law common to all the cases are: 1, whether the new stock was valid, and the parties were respectively the owners of the same; 2, whether, upon the facts and evidence agreed or found, there was a waiver, acquiescence, or estoppel, as matter of law, this last point being in one event immaterial; 3, there is the subordinate question in the Eaton circuit court case, as to whether there was any estoppel in bar as to the forty shares of new stock.

In the case of Delano *vs.* Butler, 118 U. S., 637, this Court says:

"In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of

the Currency by his certificate approved of the increase and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association and to the approval and confirmation of the Comptroller of the Currency." * * *

"The defendant, having paid for his shares of the proposed increase and taken his certificate without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, must be held to have done it, in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors."

The circuit court has adopted and enforced the same doctrine.

The supreme court of the State in the Eaton case (144 Mass., 276) say this—

"The vote of the directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done and approve of the increase. We think

that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless $500,000 was paid in and the Comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created."

The questions raised are claimed to be Federal questions, which it is within the exclusive province of this Court to adjudicate conclusively.

The main question is common to, and, when decided, will, as is believed by the receiver, dispose of some forty litigated cases still pending in the circuit courts, as nearly as can be estimated, and which must either await the result or the trial thereof proceeded with. Besides this there are nineteen cases pending in the State court, brought recently in reliance upon the doctrine of the said State court decision, to recover back money paid the bank, and involving in most of them the same general and main question as that presented in the cases at bar.

These cases must either be tried and carried to this Court or stand to await the result of the said writs of error.

The adjudication obtained in either court may be pleaded in a case between the same parties in the other. In some eight of the circuit court cases only, the amount claimed exceeds $5,000, so as to allow of writs of error. If the State court cases are first tried writs of error do not depend upon the claim being of that amount. The amount of the claims in suit against the bank in said State court case is apparently $75,900, with interest to be added. The receiver is now informed for the first time that the counsel for the respective plaintiffs in the State court cases says orally that he proposes to allow them to await the result of the cases at bar, but he has made no agreement to that end, and has only said this in view of having his circuit cases await also. There has elapsed already a period of six and more years

since the receiver was appointed, the delay being occasioned mostly because of the litigation. Several parties since have died and others of the parties in question are apparently near the end of their life, and the money sought is at great hazard for that and other reasons.

The receiver begs leave to suggest and urge the following particular and special reasons why this motion should be granted:

This Court, in the instance of the Pacific National Bank, at the October term, 1885, the term of entry, advanced five cases in law and five suits in equity brought as to same, and they were argued on the first day of the October term, 1886, and soon adjudged. (Delano *vs.* Butler, 118 U. S., 637.) After these cases had been tried in the court below it was then supposed and believed that they would result in having this Court adjudge the litigated issues of law common to all the contested cases brought by the receiver to enforce the individual liability of the stockholders, they being some three hundred and more in number. The stockholders all contested their liability on the new stock, as well as on the old, where the voluntary assessment had been paid. The receiver tried in vain to get the court below to allow the suits in the other actions to proceed, at least so far as to have the facts and liability settled therein, if the judgments were withheld to await the result of those carried up; but the court declined to allow the suits to proceed. The stockholders had mainly combined and employed the same counsel to defend the suits, a few only, including said Eaton and Thayer, acting independently and employing separate counsel.

The counsel for the combination were present when the receiver submitted the question to the Court whether he should be allowed to proceed with the other cases. They said they would make no objections to an advancement and early hearing of the cases carried up, and the cases tried were

deemed to be test cases both by the counsel and the Court. These counsel assented finally only to the motion to advance and have the cases heard on the first day of October term, 1886. Thereupon a new application was made in writing to the court below to have certain actions specifically named and some others to be designated tried also. Part of them were in the combination and part not. Counsel in the specified cases and for the combination were notified and a hearing had on the application, and the court made the decision and order, a copy of which is hereto annexed and which appears of record in the circuit court.

While the counsel for the said Eaton and Thayer were not among the number present, the decision of the court, made after a public hearing as aforesaid, was notorious and presumably known to him. The receiver heeded and followed the order of the court and no movement was made for future trials in the circuit courts in any of the pending cases or by either side until after the adjudication of the Delano case here. The result of that adjudication was what was anticipated to a great extent. It led to an adjustment of the cases without a trial, wherein the voluntary assessment had been paid. In other cases, where new stock was involved, without the payment of this voluntary assessment, the decision was not yielded to, it being contended that the opinion did not cover such definitively and positively. The circuit court has, however, adhered to the doctrine indicated. The State court regarded the doctrine as only suggested, not decided. This conflict of decision has arrested the disposition of the remaining cases, and is likely to defeat the object had in view in the trial of the supposed test cases and in their advancement and early hearing in this Court, unless this motion is granted. Whereas if this Court grants this motion and either sustains or reverses the doctrine before decided or indicated, there will be no need of any further trials in most if not all of said cases so far as now apprehended.

While the cases in the State court were not under the control of the circuit court, the case of Eaton pending there is now before this Court on writ of error and ought to be argued with the others. The receiver begs leave to urge that the motion in the cases at bar come within the rule and policy adopted in the Delano and other cases advanced before, are a part of the same litigation and virtually adjuncts thereof.

The cases of this class not yet disposed of are pending, some in the circuit court of Massachusetts, some in New Hampshire, and some in Maine. They are of large public interest, the questions involved, affecting as they do the system of national banking associations as agencies of the National Government, the public generally, and a large number of creditors. Funds are held in the Treasury of the United States, and must remain there, drawing no interest, until the pending questions in the State and circuit courts are definitively adjudicated by this Court. The bringing of the State court cases was delayed until the statute of limitations had nearly run. The litigation persisted in is causing serious complications and embarrassments, and unless soon ended will occasion great losses to the general creditors, including some other national banks.

PETER BUTLER,
Receiver Pacific National Bank.

FEBRUARY 16, 1888.

SUFFOLK, *ss:*

Then personally appeared Peter Butler, receiver, and made oath that the facts stated in the foregoing motion are true, according to the best of his knowledge, information, and belief.

Before me—

[SEAL.] I. R. CLARK,
Notary Public.

I, A. A. Ranney, on oath say that I have been and am counsel for the receiver, and am cognizant of the facts stated in the foregoing motion, and that they are true according to my knowledge and belief; that the letter filed therewith, and a copy of which is annexed, was received from the counsel for Miss Eaton and Mr. Thayer, and is signed by him; that a copy of the order of the circuit court, made upon a written application relating to the trial of other cases pending therein, after the Delano and other cases reported therewith were tried, is annexed, as it appears of record.

A. A. RANNEY.

FEBRUARY 16, 1888.

SUFFOLK, *ss:*

Personally appeared A. A. Ranney and made oath to the truth of the foregoing affidavit signed by him, according to his knowledge and belief.

Before me—

[SEAL.] I. R. CLARK,
Notary Public.

Letter of Mr. Benton referred to.

BOSTON, *January* 25, 1888.

HON. A. A. RANNEY.

DEAR SIR: As I understand your new motion to advance the Pacific Bank cases—it is, that they be set down at the first day, or some early day at the October term, 1888. Am I right? If so, I do not see why I should object. In fact, I said in my argument against the motion to advance the one case that I would agree to join in a motion to advance the three cases for argument at the October term, 1888.

Yours truly, J. H. BENTON, Jr.

Order of the Court referred to.

"FEBRUARY 10, 1886.

"No trials to be had in these cases until after the decision of the Supreme Court in the cases taken up.

"This does not apply to cases in which the assessment was made exclusively on old stock on which assessments have not been paid."

Endorsed on cover: Sup. Court U. S. 1887, Oct. term. Nos. 1231 and 1308 and 1309. The Pacific Nat'l B'k of Boston, pl'ff in error, *vs.* Mary J. Eaton; Geo. L. Thayer, trustee, pl'ff in error, *vs.* Peter Butler, receiver, and Peter Butler, receiver, pl'ff in error, *vs.* Mary J. Eaton. Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed Feb. 25, 1888. James H. McKenney, clerk.

Supreme Court of the United States.

GEORGE L. THAYER, TRUSTEE IN ERROR,

v.

PACIFIC NATIONAL BANK, PETER BUTLER, RECEIVER.

ANSWER TO MOTION OF DEFENDANT IN ERROR TO ADVANCE.

STATEMENT OF FACTS.

Sept. 28, 1881, George L. Thayer, trustee, plaintiff in error, owning forty shares of the original stock of the Pacific National Bank, paid to the bank $4,000 on account of forty shares to be thereafter created and issued to him in a proposed increase of 5,000 shares. He also at the same time paid a similar amount to the bank for the same purpose in behalf of Mary J. Eaton, who also held forty shares of the original stock.

Nov. 18, 1881, the bank failed.

Jan. 10, 1882, the proposed increase of 5,000 shares having failed and been abandoned, because the full amount thereof was not subscribed or taken, Thayer and Eaton each demanded back the money they had paid, on the ground that they had paid it upon an implied condition that they should not be required to take new stock unless the proposed amount of 5,000 shares was created.

March 14, 1882, Thayer and Eaton, by the same counsel, each brought suits in the Superior Court for Suffolk County, Massachusetts, to recover the money thus paid and demanded.

May 4, 1882, the bank filed answers, and removed both these cases to the Supreme Judicial Court.

May 5, 1886, these cases, having been continued from term to term, on account of the absence of the senior counsel for the receiver, as a member of Congress, were finally submitted to the Court upon an agreed statement of facts signed by counsel in the Eaton case, and that case was reported by the Court for the consideration of the full Court upon the questions of law raised upon such agreed statement. The Thayer case, being exactly like the Eaton case, was continued to await, and (as counsel for Thayer understood) to abide

the decision of the full Court in the Eaton case. The Eaton case was not forced to trial, as stated in the motion to advance, but was "at the request of the parties, reserved for the consideration of the full Court."

See Eaton *v.* Pacific National Bank, 144 Mass. 268.

Nov. 15, 1886, fourteen days after the case of Delano *v.* Butler was decided by this Court, the Eaton case was argued before the full Court without objection by the counsel for the receiver, who now makes the motion to advance.

March 23, 1887, the full Court decided that as the plaintiff had not ratified the action of the bank and the comptroller in attempting to fix the increase at a less sum than that originally proposed, as was done by the plaintiffs in error in Delano *v.* Butler, and other cases decided by this Court, 118 U. S. 634, she was entitled to recover, and ordered judgment for the $4,000.

April 5, 1887, counsel for receiver, declining to permit the same judgment to be entered in the Thayer case as was ordered by the full Court in the Eaton case, the Thayer case was put upon the trial list, and was subsequently at that term tried upon an agreed statement of facts by the same counsel for the receiver, who now makes the motion to advance, without objection.

May 10, 1887, the Court ruled and found for the plaintiff Thayer upon the agreed statement of facts, to which finding the counsel for the receiver excepted, and the case was reported for the consideration of the full Court, where it is now pending, and will be heard early in January, 1888.

May 14, 1887, a writ of error was taken by the receiver to this Court in the Eaton case, and was entered at this term.

Such has been the course of the litigation in the State Court.

Let us now look to the litigation in the Circuit Court.

March 14, 1883, the receiver sued Thayer and Eaton in the United States Circuit Court, claiming to recover an assessment of one hundred per cent, which had been laid upon the stock of the bank, of them as holders, not only of the original forty shares held by each of them, but of forty shares in the alleged increase. These suits were prosecuted and defended by the same counsel who acted for the respective parties in the State Court. Nothing was done to bring them to trial until after the final decision of the State Court

in the Eaton case. They were then placed upon the trial list of the Circuit Court and pressed for trial by counsel for the receiver, although the counsel for Thayer and Eaton offered to abide the final decision of this Court upon the writ of error, which had been taken by the receiver to the final judgment of the State Court in the Eaton case.

Oct. 7, 1887, the Circuit Court ordered judgment for the receiver against Thayer for the full amount of the assessment claimed, holding that by the mere payment of the money to the bank he became a stockholder in the proposed issue, and was bound by subsequent action of the directors and comptroller in changing it to a less amount than originally proposed, although he had not ratified such action, as was found to be the case in the actions of Delano *v.* Butler and others, 118 U. S. 634.

At the same time the Circuit Court held that the final judgment of the State Court in the Eaton case was an estoppel in bar in respect of the suit to recover an assessment upon the alleged new stock, and ordered judgment against her only for the assessment upon the original stock. Thereupon the receiver took a writ of error to this Court in the Eaton case, and Thayer took a writ of error at the same time to this Court in his case.

Nov. 23, 1887, the records in these cases were transmitted to this Court and are not yet printed. I have not received a copy of the record in the writ of error from the judgment of the State Court in the Eaton case, and do not understand that that is as yet printed.

Counsel for the receiver is in error in stating that the Thayer and Eaton cases in the Circuit Court were of the cases out of which Delano and Butler was selected as a supposed test case, and the rest required meanwhile to await the result. These two cases were the only cases in the Circuit Court, or, as I believe, which existed, in which no certificate was taken, no assessment paid, and in which the money was demanded back before the assessment was voted. They were defended by counsel who had no part in the defence of the large number of cases which were defended by common counsel employed by a syndicate of defendants for that purpose, and in which trial by jury was waived on the 11th of November, 1884, and out of which the Delano case was taken as a test case. A certified copy of the agreement waiving jury trial in these cases is

hereto annexed, marked "A." It will be seen that the Thayer and Eaton cases are not among the cases, and it was these cases only which were continued to await the result of the Delano case. It is therefore not true that when the Eaton case came up for trial in the State Court, the suit against her in the Circuit Court could not be tried because of the pendency of the test case in this court. There was never any reason why the case in the Circuit Court could not be tried known to me, except that there was an understanding between counsel that the litigation in the State Court would settle the entire matter. It was upon this ground that the facts were agreed and the case reserved for the consideration of the full Court by request of parties, as appears in the report of the case, 144 Mass., 268. And it was upon the ground that the litigation in the State Court, which was begun more than a year before the litigation in the Circuit Court, would dispose of the entire question in these cases in both courts, that nothing was done with the cases in the Circuit Court until May, 1887, as appears by copies of the docket entries therein hereto annexed, marked respectively "B" and "C."

The counsel for the receiver is again in error in stating in support of his motion that the "State Court declined to await the result of the cases in the Federal Courts, and allowed the case (*i. e.*, Thayer case) to be pressed for trial, for no application for delay was made, as appears by certified copy of the docket entries in that case in the State Court, hereto anexed, marked "D."

REASONS WHY MOTION SHOULD NOT BE ALLOWED.

It appears from the foregoing statement of the record that the question which the receiver desires settled, *i. e.*, whether the opinion of the State Court in the Eaton case was correct, was tried by consent of parties in the State Court, was argued without objection before the full Court of the State in the Eaton case, and that upon the decision of that case, a writ of error was taken to this Court in July last. If any case is to be advanced for argument here it would seem that that is the case.

It also appears that the Thayer case was also tried in the State Court in May last, and decided for Thayer, and *that it was only because the case went to the full Court upon the exceptions of the receiver, that a final judgment was not then entered, which could have been pleaded in bar in the Circuit Court.* Such exceptions are

now pending and to be argued in the full Court of the State within the next thirty days, so that a decision may very likely be had by that Court before the record in this case or the Eaton cases can be printed. Presumably, as is indicated in the reasons in support of the motion, the decision in that case will be adverse to the receiver. But the receiver claims that the facts in that case are different from those upon which Eaton's case was decided, which is to a certain extent true, and therefore the decision may possibly be in his favor, in which case a writ of error might be necessary by the plaintiff to this Court, however the cases now pending here should be decided.

Again, the State Court may, as the counsel for the receiver claims they should, reconsider the opinion in the Eaton case, in which case there would be no conflict between the State Court and the Circuit Court, and no necessity could be claimed to exist for advancing any of the cases in this court. It would, therefore, I submit, be not only manifestly unfair to the plaintiff in error to advance the case which was decided in the Circuit Court in October last without advancing the Eaton case, which was decided in the Circuit at the same time, and the Eaton case which was decided in the State Court in May last, in both of which writs of error taken by the receiver are pending in this court, but would be doing something which would not necessarily dispose of the supposed conflict between the State Court and the Circuit Court. Fairness to this plaintiff in error requires also that he should have in this court the benefit of the opinion of the State Court, if it shall be in his favor upon the questions raised and decided upon an agreed statement of fact in May last, and which, but for the exceptions taken by the receiver, would have resulted in a judgment which he could have pleaded in bar in the very case which the receiver now seeks to advance for argument in this court before his own exceptions, taken in May last, and now pending and speedily to be argued in the full court of the State, can be argued. It would require, I submit, a case of great public importance, almost necessity, to induce this Court to take the course indicated.

But it is said that upon the strength of the decision of the State Court in the Eaton case, a large number of writs are being brought in the State Court to recover back money paid for the new stock, and money paid under a voluntary assessment thereon, and for this reason this case should be advanced in order that the decision of the

State Court in the Eaton case may be revised. If this be so, clearly the case to advance is the Eaton case, in which the decision of the State Court was made, and which was first brought to this court upon writ of error, but obviously the decision of the State Court in the Eaton case has no application to suits where the money paid for the new stock was not demanded back within a reasonable time, as was done in that case, or to cases where the voluntary assessment was paid upon the basis of the new stock, as in the Delano case, and these two classes of cases are the only ones which the motion alleges are being brought. The examination of the record, however, in the State Court, shows only twelve cases of this character, all brought by Mr. Johnson, of counsel in the Delano cases, and all continued by agreement of counsel on file. None of these cases can, in the ordinary practice of the State Court, even if pressed for trial, reach final judgment for at least a year from this time, and I am informed by Mr. Johnson that there is no intention on his part to press them to trial until the final decision of this Court upon the Eaton and Thayer cases, and that he so informed the counsel for the receiver when the cases were continued upon their agreement more than a month ago. I ask special attention to the letter of Mr. Johnson to me as to the condition of these cases, which is printed as Appendix E hereto.

The argument of these cases in this Court at the October term, 1888, would cover all possible grounds stated by the motion to advance, and within that time the records would be printed in the three cases now pending; the Thayer case in the State Court would be argued before the full Court and decided, and a writ of error had to this Court by the defeated party, and that record printed, so that if it then appeared that the cases were of such public importance that they should be advanced upon the docket, they could all be advanced and argued together, as they manifestly should be.

I am counsel in all the cases, and should be glad to agree to join in the motion that they be advanced and marked for argument at the October term, 1888. But for reasons above set forth, and for other obvious reasons arising upon examination of the record, which I have stated, I object to the advancement of this case alone, or to the advancement of any of the three cases now pending in this Court until the Thayer case has been argued, and a reasonable time elapsed for its decision in the State Court, so that that case may be argued here with the others.

I also submit that in any possible aspect of the case there is no such pressing reason shown as will justify the advancement of any of the three cases in this Court before the records therein have been printed, so that the nature of the controversy and its possible bearing upon other litigation can be more clearly shown by the statements in support of the present motion to advance.

J. H. BENTON, JR.

EXHIBIT A.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

October Term, 1884.

LINUS M. PRICE, *Receiver*, *vs.* SEVERAL DEFENDANTS.

AGREEMENT TO WAIVE JURY TRIALS.

[FILED NOV. 11, 1884.]

Nos. 2000,	2000a,	2001,	2001a,	2002,	2002a,	2003
2003a,	2004,	2004a,	2005,	2005a,	2006,	2006a
2007,	2007a,	2008,	2008a,	2009,	2011,	2012,
2012a,	2013a,	2014a,	2015,	2015a,	2018a,	2021a
2022,	2022a,	2024,	2026,	2026a,	2027,	2027a
2028,	2028a,	2029,	2029a,	2030,	2030a,	2031,
2031a,	2032a,	2033,	2034,	2034a,	2035,	2035a
2036,	2036a,	2037,	2037a,	2038,	2038a,	2039,
2040,	2040a,	2041,	2042,	2042a,	2044a,	2045,
2045a,	2046a,	2047,	2047a,	2048,	2048a,	2049a
2050,	2051,	2052,	2052a,	2053,	2053a,	2054,
2054a,	2055,	2055a,	2056,	2056a,	2057a,	2058,
2058a,	2059,	2059a,	2060a,	2061,	2062,	2062a
2062a,	2063,	2063a,	2064a,	2065,	2066a,	2067,
2068,	2069a,	2070,	2070a,	2071,	2072a,	2073,
2073a,	2074,	2074a,	2075,	2075a,	2076,	2076a
2077,	2077a,	2078,	2078a,	2079a,	2080,	2082a
2083,	2084,	2084a,	2085,	2085a,	2086,	2087a
2088,	2088a,	2090,	2090a,	2091,	2092a,	2093,
2094,	2095,	2095a,	2096,	2097,	2097a,	2099,
2101a,	2102,	2104a,	2105,	2105a,	2106,	2106a
2107,	2107a,	2108,	2109,	2110,	2110a,	2111,
2111a,	2112,	2112a,	2113,	2113a,	2114a,	2115,

2115a,	2117,	2118,	2118a,	2119,	2119a,	2120a
2121,	2121a,	2122,	2122a,	2123,	2123a,	2124,
2124a,	2125,	2125a,	2126,	2126a,	2127,	2127a
2128,	2128a,	2129,	2129a,	2130,	2130a,	2131,
2131a,	2132,	2132a,	2133,	2133a,	2134a,	2135,
2135a,	2136,	2253,	2254.			

Agreement to waive Trial by Jury. In the above-numbered actions the parties thereto waive a trial by jury and agree that said actions be submitted to the Court.

A. A. RANNEY,
Att'y for Plaintiff.
BENJ. N. JOHNSON,
For the Defendants.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

I, ALEX. H. TROWBRIDGE, Deputy Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of an Agreement filed Nov. 11, 1884, in the above-numbered actions.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this fifth day of December, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[SEAL]

ALEX. H. TROWBRIDGE,
Deputy Clerk.

EXHIBIT B.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 2033A, Law Docket.

LINUS M. PRICE, *Receiver*, v. MARY J. EATON.

DOCKET ENTRIES.

RANNEY & CLARK, for Complainant.
J. H. BENTON, Jr., for Defendant.

May T. 1883	May 16	Entered. Declaration filed.
	June 2	Answer & declaration in set-off filed.
Oct. T. 1883		
Oct. T. 1885	May 10	Motion of Peter Butler, Receiver, filed.
May T. 1887	May 20	Offer of Judgment, filed.
	" 31	Answer since last continuance, filed.
	" 31	Agreement waiving Jury trial filed. (N.) Assigned for June 21st.
	" 31	Nelson, J. Facts to be found specially by the Court.
	July 25	Heard July 25 & 26 before Nelson, J.
May T. 1887	July 25	Motion to Amend Answer filed since last continuance — filed and allowed Nelson, J.
May T. 1887	Oct. 7	Nelson, J. Judgment for Plaintiff Dam. . . . . $5177.
		& costs 97.70
		$5274.70

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

I, ALEX. H. TROWBRIDGE, Deputy Clerk of Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the Docket Entries in the cause entitled,

2033 (A), Law Docket

LINUS M. PRICE, *Receiver*, v. MARY J. EATON,

lately determined in said Circuit Court.

In testimony whereof I hereunto set my hand and affix the seal

of said Circuit Court at Boston, in said District, this fifth day of December in the year of our Lord one thousand eight hundred and eighty-seven and of the Independence of the United States the one hundred and twelfth.

[SEAL] ALEX. H. TROWBRIDGE,
Deputy Clerk.

EXHIBIT C.

CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

No. 2108A, Law Docket.

LINUS M. PRICE, *Receiver*, *v.* GEORGE L. THAYER, *Tr.*

DOCKET ENTRIES.

RANNEY & CLARK, for Complainant.
J. H. BENTON, Jr., for Defendant.

May T. 1883	May 16	Entered. Declaration, filed.	
	June 2	Answer and Declaration in set-off filed.	
May T. 1884			
Oct. T. 1885	May 10	Motion of Peter Butler, Receiver, filed.	
May T. 1887	May 20	Offer of Judgment, filed.	
	" 31	Agreement waiving Jury trial filed in No. 2033A assigned for June 21st (N)	
	" 31	Nelson, J. Facts to be found specially by the Court. Heard July 25 & 26 before Nelson, J.	
May T. 1887	Oct. 7	Nelson, J. Judgment for Plaintiff. Dam.	$10354
		& costs	83.18
			$10437.18

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

I, ALEX. H. TROWBRIDGE, Deputy Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the Docket Entries in the cause entitled,

2108(a), Law Docket.

LINUS M. PRICE, *Receiver*, *v.* GEORGE L. THAYER, *Tr.*

ately determined in said Circuit Court.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this fifth day of December in the year of our Lord one thousand eight hundred and eighty-seven and of the Independence of the United States the one hundred and twelfth.

ALEX. H. TROWBRIDGE,
Deputy Clerk.

EXHIBIT D.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

SUPREME JUDICIAL COURT.

APRIL TERM, 1882.

No. 470.

GEO. L. THAYER, ET AL., *Trustees*, *v.* PACIFIC NATIONAL BANK.

J. H. BENTON, JR. MORSE & STONE.

AFFIDAVIT TO REMOVE, AND ANSWER FILED IN SUP'R CT.

SEPT. TERM, 1882.

J. H. BENTON, JR. MORSE & STONE.

APRIL TERM, 1883.

" " " " " "

SEPT. TERM, 1883.

" " " " " "

APRIL TERM, 1884.

" " " " " "

SEPT. TERM, 1884.

" " " " " "

Ranney & Clark
vice
Morse & Stone
Sept. 26, 1884.

APRIL TERM, 1885.

J. H. Benton, Jr. — Ranney & Clark

SEPT. TERM, 1885.

" " " — " " "

DOCKET OF 1886.

" " " — " " "

DOCKET OF 1887.

" " " — " " "

Apr. 2. Motion of Peter Butler, Rec'r, to be admitted party to defend.

May 10. Peter Butler, Rec'r, admitted as party to defend, and appears to defend said suit.

May 20. Answer of Peter Butler, Rec'r, filed.

June 4. Court finds for plaintiff in sum of $4088.00.

LAW ON REPORT.

Oct. 12. Mo. filed of Peter Butler, Rec'r, for leave to file further answer.

Commonwealth of Massachusetts,
Suffolk, ss.

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the foregoing is a true copy of the Docket Entries up to present date, in the case of

George L. Thayer, et al. *Trustees*, *v.* Pacific National Bank,

now pending in said Court.

In Witness whereof, I hereunto set my hand and affix the seal of said Supreme Judicial Court, this sixth day of December in the year of our Lord One thousand eight hundred eighty-seven.

[seal] JOHN NOBLE,
Clerk.

EXHIBIT E.

BENJAMIN N. JOHNSON,
COUNSELLOR-AT-LAW,
EQUITABLE BUILDING.

BOSTON, December 7, 1887.

J. H. BENTON, Jr., Esq.

Dear Sir, — In response to your request for information about the suits pending in the Superior Court of this State against the Pacific National Bank, I give you the following facts: —

There are eighteen of these suits in each of which I am counsel for the plaintiff.

In one of these suits, the plaintiff is a party who never was and has never been alleged by the receiver to be a shareholder in said bank.

In five of the suits, the plaintiffs are parties against whom final judgments were rendered, in pursuance of the decision in the Delano case, in suits brought to enforce their individual liability as shareholders, all of which judgments were fully paid many months ago, as appears by the docket of the Circuit Court, against these five parties no suits are now pending in favor of the receiver.

The remaining twelve suits are in favor of parties, who severally subscribed for new stock in the proposed increase of five thousand shares in the stock of the Pacific National Bank, voted Sept. 13, 1881, and who paid their money therefor, but who never afterwards, by payment of assessments or otherwise, recognized or ratified the action of the directors of the bank and the Comptroller of the Currency affecting the increase. Against each of these twelve parties, there has been a suit pending in the United States Circuit Court for this District since March 14, 1883, for the purpose of enforcing an alleged liability arising from the subscription for new stock. Jury trials have been waived in these cases pending in the Circuit Court, and they have been continued from time to time to await the final determination by the Supreme Court of the United States, of the Eaton and Thayer cases, in which you are counsel, and which have been decided by the Supreme Court of this State; also to await the final determination of the Aspinwall case, which was heard by the Circuit Judge of this district in July last, but on which no decision has yet been rendered.

The purpose for which these twelve suits were brought in the State Court against the bank was to prevent the statute of limitations becoming a bar to such suits in the event that the cases pending against these twelve parties in the Circuit Court, or any of them, should be finally determined in their favor.

I have had and now have no intention of pressing these twelve suits to trial in the State Court, until after the final determination of the Eaton and Thayer cases by the Supreme Court of the United States, and the final determination of the suits pending against these twelve parties in the Circuit Court. I informed Mr. Ranney of my purpose and intentions, as above expressed, over a month ago, at the time the actions in the State Court were continued.

Yours very truly,

BENJAMIN N. JOHNSON.

Supreme Court of the United States.

1231 PACIFIC NATIONAL BANK, IN ERROR,

v.

MARY J. EATON.

1308 GEORGE L. THAYER, TRUSTEE, IN ERROR,

v.

PETER BUTLER, RECEIVER.

1309 PETER BUTLER, RECEIVER, IN ERROR,

v.

MARY J. EATON.

ANSWER TO THE SECOND MOTION OF RECEIVER TO ADVANCE.

The state of the litigation out of which the receiver claims the necessity for advancing these cases arises, is shown in the answer of the defendant in error to the motion of the receiver to advance Number 1308, which motion was recently overruled. I do not understand any new fact to be now stated by the receiver, except that the State Court has ordered the case of Thayer and another, Trustees, *v.* The Bank in the State Court to be continued to await the final decision of these causes in this Court. Counsel for receiver is in error, however, in stating that any order has been made by the State Court to continue that case to await these. At the call of the docket at this term the Court simply said the action would stand continued, whether to await or not the Court had not definitely decided. The counsel who made the motion for the receiver was not present.

I said, in answer to the former motion to advance, that when these four cases were all in this Court and the records printed, so that the nature of the controversy and its possible bearing upon other litigation could be clearly shown, I should be glad to have the four cases marked for argument at the October term, 1888, if it appeared to the Court that the cases were of such public importance that they should be thus advanced, and that is my position now. I submit that that question cannot be fairly determined until the records are printed, and I object to the present motion because it seems to me

to be an attempt by means of a motion to argue the receiver's side of these cases in advance. The larger part of the motion is simply an argument of the main question in the case, which is whether Thayer and Eaton ratified the action of the Bank in assuming to treat them as stockholders upon the basis of their mere subscription to a proposed issue, the whole of which was never subscribed, and the basis of which the Bank assumed to change without their knowledge or consent. It is not true that Thayer and Eaton suffered the money which they paid on account of their subscription to remain and be used as a part of the capital of the bank with knowledge that the whole amount of the proposed issue had not been taken and paid for. The record shows distinctly that they had no knowledge that their money was thus treated. It is not true that Thayer and Eaton had actual knowledge generally of what was being done by the bank until after the bank failed, the proposed increase was abandoned and the bank attempted to substitute another and different increase for that to which Thayer and Eaton had subscribed. The records expressly find that Thayer and Eaton had no knowledge that they stood on the books as the owners of stock in the alleged increase until after they demanded the return of their money paid on account of the proposed increase. The records also show, as the State Court in their decision, say, that "it is plain that there is no evidence of actual assent or ratification." It is true that the State Court have decided that as Thayer and Eaton had not ratified the action of the bank in attempting to fix the increase at a less sum than that originally proposed, as was done by the plaintiffs in error in Delano *v.* Butler, and other cases decided by this Court (118 U. S. 634), they were not stockholders in respect of the alleged shares in the proposed increase: while the Circuit Court has decided that they did become owners of such shares by the mere payment of the money to the bank for such shares to be thereafterwards created in the proposed issue, and were therefore bound by the subsequent action of the directors in changing the proposed issue to a less amount. The question here is, which of these two decisions is correct. If the decision of the Circuit Court is right, it may fairly be assumed that the State Court will follow the decision of this Court to that effect in the disposition of the causes now pending in the State Court, which are, as I showed in answer to the previous

motion, only twelve in number, and which the plaintiffs therein do not intend to try until the final decision of these causes in this Court. But if the decision of the State Court is right, those cases now pending in the State Court will undoubtedly be tried by the receiver upon the question, whether the plaintiffs therein did not by continuing to hold their stock, as they did in all cases, for several years before bringing suit, and never demanding back their money as Thayer and Eaton did, within a reasonable time, ratify the action of the directors, as was done in Delano *v.* Butler. In other words, the decision of these cases can affect at most the decision of only twelve cases now pending in the State Court. Those causes are not to be tried in any event by the plaintiffs, as is shown by the letter of their counsel annexed to my answer to the former motion to advance, until the final determination of these cases. *The final determination of these cases would not dispose of the twelve causes in the State Court, unless the decision of the State Court in Eaton* v. *The Bank should be reversed by this Court upon the ground that the mere subscription to the proposed increase made the subscribers, and persons paying under the subscription, holders of stock in the proposed increase so as to be held liable as such, although the bank afterwards changed the amount of the increase without their knowledge or consent.*

These are the facts. Whether they show a sufficient reason to advance these causes for argument at the October Term, 1888, I do not care to discuss.

J. H. BENTON, JR.